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In The

Supreme Court of the United States

October Term, 1996

DP PARTNERS, LIMITED PARTNERSHIP and SUSSEX PROPERTIES, INC.,

Petitioners,

vs.

HALL FINANCIAL GROUP, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER M. WEIL
Counsel of Record
ANTHONY A. PETROCCHI
Attorneys for Petitioners
1900 North Tower, L.B. 364
Plaza of the Americas
Dallas, Texas 75201
(214) 969-7272

71237 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

QUESTIONS PRESENTED

I. May an unsuccessful proponent of a competing plan of reorganization in a bankruptcy proceeding be found to have waived its right to reimbursement for administrative expenses under 11 U.S.C. § 503(b)(3)(D), (b)(4), if that unsuccessful plan proponent fails to disclose its intention to make a claim prior to confirmation of the debtor's plan of reorganization?

II. Does the use of the word "shall" in the language of § 503(b) preclude a bankruptcy court from determining that a previously undisclosed administrative claim of an unsuccessful plan proponent is untimely, if filed within the claims bar date but after confirmation of the plan of reorganization?

III. Having determined that the administrative claim of the unsuccessful plan proponent is untimely, does a bankruptcy court commit error by then allowing any portion of that claim?

IV. Did the Fifth Circuit Court of Appeals adopt an incorrect interpretation of "substantial contribution" under 11 U.S.C. § 503 by disregarding the relevance of intent and motivation of the creditor in its role as a proponent of a competing plan of reorganization?

LIST OF PARTIES

Petitioners:

DP Partners, Limited Partnership
Sussex Properties, Inc.
2626 Cole Avenue, Suite 400
Dallas, Texas 75204

Christopher M. Weil
Anthony A. Petrocchi
Weil & Petrocchi
Lock Box 364
1900 North Tower
Plaza of the Americas
Dallas, Texas 75201

Attorneys for Petitioners

Respondent:

Hall Financial Group, Inc.
750 N. St. Paul, Suite 200
Dallas, Texas 75201

E.P. Keiffer
Burke & Wright
2900 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2102

Attorneys for Respondent

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The Petitioners DP Partners, Limited Partnership and Sussex Properties, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on February 28, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) may be found at *In the Matter of DP Partners, Ltd. Partnership, Debtor. Hall Financial Group, Inc. v. DP Partners, Ltd. Partnership; Sussex Properties, Inc.*, 106 F.3d 667 (5th Cir. 1997). The November 3, 1995 Memorandum Opinion and Order (Appendix B) of the United States District Court for the Northern District of Texas, Dallas Division, and the Order Partially Allowing Hall Financial Group, Inc.'s Motion for Allowance of Fees and Expenses as an Administrative Claim of November 14, 1994 (Appendix C) together with the Findings of Fact and Conclusions of Law of November 14, 1994 (Appendix D), entered by the United States Bankruptcy Court for the Northern District of Texas, Dallas Division have not been designated for publication in any official reporter. As indicated in the references above, copies of each of those opinions and judgments are included within the Appendices to this Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was delivered on February 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. R. 10.1(a), (c).

STATUTE INVOLVED

11 U.S.C. § 503(b)(3), (4):

> Allowance of administrative expenses
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--
>
> * * *
>
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by --
>
> * * *
>
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or
>
> * * *
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this

> subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

STATEMENT OF THE CASE

The issue presented in this case is whether a bankruptcy court may hold as untimely the substantial administrative claim of an unsuccessful plan proponent in a Chapter 11 bankruptcy proceeding filed after another party's plan of reorganization has been confirmed, which claim had not been disclosed in any of the proceedings prior to plan confirmation.

Petitioner DP Partners, Limited Partnership ("DPP") was the debtor in the Chapter 11 proceeding pending before the United States Bankruptcy Court for the Northern District of Texas under cause no. 394-31738-RCM-11. Petitioner Sussex Properties, Inc. ("Sussex") is the general partner of DPP.

DPP filed a voluntary Chapter 11 bankruptcy petition with the Bankruptcy Court on October 15, 1993. Respondent Hall Financial Group, Inc. ("Hall") became a creditor of the Debtor's estate by reason of its purchase during the bankruptcy of three minor unsecured claims in order to advance its own economic interests in an attempt to purchase DPP's assets at a bargain price. Hall filed a competing plan of reorganization which was unsuccessful.

On August 31, 1994, the Bankruptcy Court entered an Order Confirming Second Amended Plan of Reorganization, as Amended, of DP Partners Limited Partnership, confirming DPP's Second Amended Plan of Reorganization filed July 1, 1994, and

the First Amendment to the Second Amended Plan of Reorganization dated August 11, 1994 (the plan as amended is referred to as "the Debtor's Approved Plan"). That confirmation order was not appealed.

Following confirmation of the Debtor's Approved Plan, Hall filed its Fee Motion under 11 U.S.C. §§ 503(b)(3)(D) and (b)(4), seeking reimbursement from the estate for professional fees incurred during its participation in DPP's reorganization proceeding, on the basis that it had made a "substantial contribution" to the confirmation of the Debtor's Approved Plan. Those expenses were incurred in connection with its promotion of the unsuccessful competing plan of reorganization which, if confirmed, would have permitted Hall to acquire the general partner interest in DPP and thus gain control over DPP and the five apartments projects that constituted the Debtor's estate. Hall admitted that it bought claims in the estate for the purpose of making a proposal to State Street Bank ("State Street"), DPP's primary and a secured creditor.

In reality, Hall bought a ticket to an auction. The auctioneer was State Street, the lienholder on the assets that Hall badly wanted to acquire. Hall participated in the bankruptcy proceedings because of the favorable opportunity to bid on and acquire five well situated apartment projects that DPP had pending negotiations on to reduce $60 million in liens to approximately $40 million.

Having lost the battle when the creditors in the estate overwhelmingly turned Hall down, Hall sought reimbursement for its fees and expenses from a debtor already forced to restructure its debt, after failing to notify any party or the Court prior to confirmation and plan transaction closing of its intention to make such an application in an amount exceeding $150,000. The Bankruptcy Court denied Hall's Fee Motion in part and

granted that motion in part (to the extent of $12,500) after evidentiary hearing by its Fee Order dated November 14, 1994 (Appendix C).

Although the Bankruptcy Court and District Court below properly determined that Hall's administrative claim was untimely, a panel of the United States Fifth Circuit Court of Appeals reversed those lower courts, holding that the Bankruptcy Code required "nothing more" of Hall than to file his administrative claim within the bar-date and those claims "could not be barred by some implied advanced warning requirement." *DP Partners Ltd. Partnership v. Hall Financial Group, Inc.*, 106 F.3d 667, 672 (5th Cir. 1997). It is from the Fifth Circuit Court's decision that Petitioners seek review by Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THIS PETITION RAISES ISSUES OF EXCEPTIONAL IMPORTANCE REGARDING THE INTEGRITY OF CHAPTER 11 PLAN CONFIRMATION BANKRUPTCY PROCESS.

In overruling the Bankruptcy Court and District Court orders below,[1] dismissing those opinions as no more than a "well-intentioned attempt at equity," the Fifth Circuit Court of Appeals turned the statutory scheme for confirmation of a Chapter 11 plan of reorganization on its head. In making light of the notion that scheming litigants might take advantage of the application

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1. The Fifth Circuit Court also effectively overruled (at least within the boundaries of the Fifth Circuit) the New Hampshire bankruptcy court decisions in *In re DiBerto* 164 B.R. 7 (Bankr. D. N.H. 1993), and *In re Public Service Co.*, 160 B.R. 404 (Bankr. D. N.H. 1993), which contain contrary holdings.

of §§ 503(b)(3) and (b)(4) adopted by the Fifth Circuit Court, because they know that "at a minimum, their fees for inflated, unrealistic bid would be reimbursed," 106 F.3d at 671, that court has permitted the prophecy to be realized.

On remand, prior to the opportunity for this Court to exercise review, the Bankruptcy Court now has awarded Hall, the unsuccessful plan proponent, an administrative claim exceeding $130,000. In other words, although the Fifth Circuit Court noted that another bankruptcy court had found contrary to its holding, "reasoning that nondisclosure of large claims can potentially wreak havoc in the bidding process by making otherwise competitive plans economically unfeasible after confirmation," 106 F.3d at 671, it employed faulty logic and predictably has caused such a result in this action and thereby threaten further inequity and uncertainty in the bidding and advancement of competing bankruptcy reorganization plans in the future.

To recognize on one hand that bankruptcy judges have been "accorded discretion in setting administrative-claim bar-dates," and then, on the other hand, to require bankruptcy courts to award fees requested by unsuccessful plan proponents if they file within bar dates but after confirmation of a plan, creates a result aborent to the scheme of plan confirmation under the Bankruptcy Code.

When making a determination of whether a plan should be confirmed, a bankruptcy court, the debtor and creditors are faced with the requirement that confirmation of a proper plan should not result in the liquidation or need for further reorganization of the debtor or its successor. 11 U.S.C. § 1129(a)(11). To achieve that end, plan proponents must solicit acceptance of a plan through a court-reviewed and approved disclosure statement containing "adequate information." 11 U.S.C. § 1125. Bankruptcy courts have long recognized that adequate

information for a written disclosure statement should include the estimated administrative expenses, including attorneys' fees and accountants' fees. *See, e.g., In re Metrocraft Publishing Services, Inc.*, 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984); *see also, Westland Oil Development Corp. v. Mcorp Management Solutions, Inc.*, 157 B.R. 100, 102 (S.D. Tex. 1993). It is only with adequate information of both assets and claims that the debtor can advance a plan in good faith, that a court can reasonably be required to evaluate a disclosure statement and a plan for confirmation for approval, and that creditors may be informed enough to vote in their interests on or between proposed plans.

It is integral to the statutory bankruptcy process that a bankruptcy court have discretion to deny as untimely an administrative claim filed post-confirmation when the claim is not addressed in the disclosure statement supporting the approved plan and the claimant has not objected to the disclosure statement or the plan on the basis of inadequate allocation of amounts to cover administrative claims. To hold otherwise is illogical under the Bankruptcy Code and devastating to the plan confirmation process. There is no reasonable way to gauge a plan's feasibility if any creditor participating in the plan confirmation proceedings may later file an administrative claim which the bankruptcy court is required to grant without regard to untimeliness. Whether or not that claimant's self-serving participation resulted in substantial contribution is insufficient alone to justify a correspondingly substantial administrative expense not allocated for under the approved plan and which necessarily requires a struggling reorganized debtor to pay from the estate a claim which is outside its plan requirements. It now behooves Chapter 11 debtors to file for relief outside the Fifth Circuit, preferably in New Hampshire, particularly if a competing plan is anticipated, so that the plan, if confirmed, will have more certainty with respect to feasibility and little

fear of an ambush from post-confirmation administrative claims made by disgruntled, unsuccessful plan proponents.

II.

THE FIFTH CIRCUIT COURT OF APPEALS IMPROPERLY REVERSED THE BANKRUPTCY COURT'S DETERMINATION THAT HALL'S POST-CONFIRMATION FILING OF AN ADMINISTRATIVE CLAIM WAS UNTIMELY.

In ruling on an issue it admitted was "*res nova* for this court," *DP Partners*, 106 F.3d at 671, the Fifth Circuit Court of Appeals crafted an undeserved and inequitable gift for unsuccessful competing plan proponents and an unreasonable burden for successful plan proponents under the Bankruptcy Code by overturning the Bankruptcy Court's determination and District Court's affirming order, that Hall waived its right to any claim under 11 U.S.C. § 503(b) because it failed to disclose the intention to make such claim prior to the entry of the confirming order.

It is significant that Hall did not file its Fee Motion until September 15, 1994, after the Debtor's Approved Plan was confirmed on August 31, 1994, and after the transactions contemplated thereunder were closed on September 12, 1994. When calculating the plan comparison models and examining the feasibility of the Debtor's plans, Hall's own accountant did not even consider Hall's purported administrative expenses and fees. In addition, although Hall knew of the existence of the expenses it sought to recover, it made no objection to the limited allowance for administrative expenses in DPP's disclosure statement or at the hearing thereon (which estimates did not include amounts sufficient to cover the fees Hall sought), Hall failed to object to feasibility of the Debtor's Approved Plan with

respect to cost of administration or priority claims, and Hall never mentioned its intent to seek administrative fees as the unsuccessful plan proponent. In fact, as recognized by the District Court below, Hall didn't even consider filing its claim until after the confirmation of Debtor's Approval Plan. Appendix B, p. 22a n. 5.

As already discussed to some extent in the preceding section with respect to the legal conclusion as to Hall's waiver of claim for administrative fees, the Bankruptcy Court's reasoning and reliance upon the cited New Hampshire bankruptcy court opinions is firmly rooted in the nature and purpose of a reorganization proceeding under Chapter 11, which is to permit a debtor an opportunity to reorganize and restructure its debts through a plan providing for the payment of allowed creditors claims. *In re Continental Airlines Coop.*, 38 B.R. 67 (Bankr. S.D. Tex. 1984). Crucial to a successful reorganization is the need to encourage meaningful and productive creditor participation in the reorganization proceeding, while keeping administrative expenses to a minimum, so as to not deplete the pool of assets available to unsecured creditors. *In re 9085 E. Mineral Office Building, Ltd.*, 119 B.R. 246, 250 (Bankr. D. Colo. 1990); *In re Buttes Gas and Oil Co.*, 112 B.R. 191, 196 (Bankr. S.D. Tex. 1989); *In re United States Lines, Inc.*, 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989); *In re American 3001 Telecommunications, Inc.*, 79 B.R. 271, 273 (Bankr. N.D. Tex. 1987).

Accordingly, creditors and others seeking administrative compensation should disclose that intention as early in the reorganization process as possible. Payment of those expenses necessarily must be made from assets of the estate. As authorities cited herein make abundantly clear, the successful applicant for § 503(b) compensation must show that its efforts are not solely

for the purpose of furthering its own economic self interest.[2] Therefore, such a creditor should be required to disclose those intentions so that "all parties in interest may be advised and may react appropriately." *In re DiBerto*, 164 B.R. at 4, n. 4. Even though an applicant may not know the full amount of reimbursement sought at the time of disclosure, what is important is affording all parties in interest, especially the debtor, the opportunity to react accordingly, and thus improve the chances for a successful reorganization.

The importance of disclosure of sufficient information to allow interested parties to make rational and intelligent decisions concerning a proposed plan of reorganization is critical to confirmation. That is the purpose of 11 U.S.C. § 1125, which requires the debtor to submit a disclosure statement containing adequate information to allow creditors to determine whether to accept or reject the proposed plan. 11 U.S.C. § 1125(b); *Metrocraft Publishing Services, Inc.*, 39 B.R. at 568; *In re Ferretti*, 128 B.R. 16 (Bankr. D. N.H. 1991). To require creditors contemplating applying for administrative expense priority under 11 U.S.C. § 503(b)(3)(D) to disclose those intentions prior to confirmation is consistent with the policy of full disclosure at the heart of restructuring and in Chapter 11 in general. Accordingly, the determination by the Bankruptcy Court and District Court that Hall waived its right, if any, to claim administrative expenses by failing to disclose such claim prior to confirmation should be affirmed and the Fifth Circuit Court of Appeals should be reversed.

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2. However, as discussed in Section V of this Petition, the Fifth Circuit, without citing any supporting authority or distinguishing contrary authority, adopted a standard that "a creditor's motive in taking actions that benefit the estate has little relevance in the determination whether the creditor has incurred . . . expenses in making substantial contribution to a case." *DP Partners*, 106 F.3d at 673.

Hall did know that DPP estimated its administrative claims at $20,000 over deposits and filed an objection to the plan (not the disclosure statement) on the basis it believed ***parties other than Hall might incur higher fees to which Hall would object.*** Most importantly, Hall did not object to DPP's estimate of professional fees in the confirmed plan and disclosure statement, although Hall purportedly intended to seek to cause the Debtor to pay Hall's fees and expenses in proposing an unsuccessful plan as an additional administrative claim.

III.

ALTHOUGH FILING OCCURRED BEFORE THE CLAIMS BAR DATE, HALL WAIVED ITS ADMINISTRATIVE CLAIM BECAUSE OF ITS UNTIMELY CLAIM DISCLOSURE.

Hall argued that it did not waive its claim for over $150,000 under 11 U.S.C. § 503 because it filed an administrative claim prior to the general cut-off date for administrative claims, a proposition the Fifth Circuit Court has accepted. However, the claim was filed after the Debtor's Approved Plan had been confirmed and substantially closed, and Hall made no mention of its intention to file such a claim prior to the Plan's confirmation and closing. As discussed, this position is contrary to existing case authority and court practice. *See, e.g., In re DiBerto,* 164 B.R. 1, 4 (Bankr. D. N.H. 1993). Petitioners are not seeking to read an unwritten duty into the statute. They are seeking to enforce the statute as interpreted and applied logically by other courts and the Bankruptcy Court below.

Hall's argument, supported by the Fifth Circuit Court of Appeals' decision, that it should be able to hide behind the log and file its claim at the "13th hour" after confirmation of the plan and closing of the transaction as long as the claim was

filed before the claim cut-off date is flawed. The rule imposed by *In re DiBerto,* and adopted by the Bankruptcy Court below, does not require that a substantial contribution claim be filed before confirmation. That rule simply requires that a creditor, which is presumed under the law to act primarily in its own self-interest, *In re United States Lines, Inc.*, 103 B.R. 427 (Bankr. S.D.N.Y. 1989), disclose its intent to seek reimbursement of expenses as an administrative claim in a way that the successful plan proponent can allocate for such contingency in its plan and so that the other creditors voting on the plan and the court examining the plan can evaluate the feasibility of same. It is disingenuous to assert that a substantial administrative claim in the amount of $150,000, not addressed or anticipated anywhere in the confirmed and closed plan, will not affect the feasibility of the confirmed plan if that claim is subsequently requested and allowed. The Bankruptcy Court's conclusions are consistent with and support the general rule that administrative expenses under 11 U.S.C. § 503(b) normally are given strict scrutiny by bankruptcy courts because of their priority status which, if the administrative claim is granted, ***necessarily deplete the funds available to general unsecured creditors. In the Matter of Cuisinarts, Inc.***, 115 B.R. 744 (Bankr. D. Conn. 1990).

The undisputed evidence is that DPP proposed and caused a plan to be confirmed and closed without inclusion in the Debtor's Approved Plan for any contingency for the payment of a substantial administrative claim by a defeated plan proponent holding a minor claim purchased during bankruptcy for the purpose of pursuing its own plan for its own economic self-interest. Hall did not file its Fee Motion until September 15, 1994, after the approved Plan was confirmed on August 31, 1994, and after the transactions contemplated by the Plan closed on September 12, 1994.

The importance of disclosure of sufficient information to

allow interested parties to make rational and intelligent decisions concerning a proposed plan of reorganization is critical to confirmation. The purpose and language of 11 U.S.C. § 1125 requires the debtor to submit a disclosure statement containing sufficient information to allow creditors to determine whether to accept or reject the proposed plan. 11 U.S.C. § 1125(b); *In re Ferretti,* 128 B.R. 16 (Bankr. D. N.H. 1991).

To require creditors contemplating applying for administrative expense priority under 11 U.S.C. § 503(b)(3)(D) to disclose those intentions prior to confirmation and the administrative claims bar date is consistent with the policy of full disclosure at the heart of restructuring and in Chapter 11 in general. Accordingly, the determination by the Bankruptcy Court that Hall waived its right, if any, to claim administrative expenses by failing to disclose such claim prior to confirmation, even though filed prior to the claims bar date, should have been affirmed by the Fifth Circuit Court. To hold otherwise would result in a hyper-technical reading of § 503(b) which undermines the bankruptcy court's acknowledged discretion in setting bar dates and conflicts with the disclosure and objection requirements of the plan confirmation process.

IV.

HAVING WAIVED ITS ADMINISTRATIVE CLAIM BY UNTIMELY FILING, HALL SHOULD HAVE BEEN PRECLUDED FROM ANY RECOVERY.

If the Bankruptcy Court properly denied the requested relief under that Fee Motion because Hall failed to timely file its administrative claim (*see supra, Sections II and III*), that Court correspondingly committed error by granting Hall's Fee Motion to the extent of $12,500.

The Fifth Circuit Court of Appeals criticized the Bankruptcy Court's reliance upon *In re Public Service Company of New Hampshire*, 160 B.R. 404 (Bankr. D. N.H. 1993), and *In re DiBerto*, 164 B.R. 1 (Bankr. D. N.H. 1993), as no more than "well-intentioned attempt at equity . . . at odds with the clear statutory language." *DP Partners*, 106 F.3d at 671. However, both of those opinions are directly on point in the case on appeal before this Court, are well-reasoned, support the conclusion that Hall should receive no amount under its administrative claim, and remain conflicting but good law outside the Fifth Circuit.

In other words, because Hall's administrative claim was filed in an untimely manner, it should be denied in whole, not in part, and the award of $12,500 should be reversed in its entirety.

V.

THE COURT OF APPEALS APPLIED AN IMPROPER INTERPRETATION OF "SUBSTANTIAL CONTRIBUTION" UNDER 11 U.S.C. § 503(b), ATTRIBUTING LITTLE, IF ANY, RELEVANCE TO A CLAIMANT'S INTENT OR MOTIVATION.

The burden of proof is on the applicant to establish by a preponderance of the evidence that it made a "substantial contribution" entitling it to administrative expenses under 11 U.S.C. § 503(b). *In re 9085 East Mineral Office Building, Ltd.*, 119 B.R. 246 (Bankr. D. Colo. 1990); *In re FRG*, 124 B.R. 653 (Bankr. E.D. Pa. 1991). What constitutes "substantial contribution," is within the bankruptcy court's "informed discretion." *In re 9085 East Mineral Building, Ltd.*, 119 B.R. at 249; *see also, Matter of Baldwin-United Corp.*, 79 B.R. 321 (Bankr. S.D. Ohio 1987).

As stated above, administrative expenses under Bankruptcy

Code § 503(b) normally are given strict scrutiny by bankruptcy courts because of their priority status which, if granted to an applicant, necessarily deplete the funds available to general unsecured creditors. *In the Matter of Cuisinarts, Inc.*, 115 B.R. 744 (Bankr. D. Conn. 1990). Accordingly, courts presented with this issue (other than the Fifth Circuit Court's ruling in the subject case) have gone to great lengths to separate efforts undertaken by a creditor solely to further its own economic self interest, from those creditors whose primary motivation is to benefit all creditors and whose efforts result in a direct, rather than incidental, benefit to the estate. *In re Lister,* 846 F.2d 55 (10th Cir. 1988); *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bankr. D. Utah 1985). As the New Hampshire bankruptcy court's opinion, relied upon by the Bankruptcy Court, and disregarded by the Fifth Circuit Court below, accurately noted:

> Bankruptcy Courts are leery of allowing too easy a resort to "substantial contribution" claims under the statutes since practically all of the expectable negotiating activity during the course of reorganization case aimed at improving a plan could be deemed to be a "contribution" by all parties involved in negotiating a plan that may be confirmed on a consensual basis.

In re DiBerto, 164 B.R. 1, 3 (Bankr. D. N.H. 1993).

In appellate proceedings below Hall attacked any consideration of a creditor's "motivation" or intention in participating in the plan confirmation process as a part of the substantial contribution to the estate test, for which theory Hall eventually obtained the notice and approval of the Fifth Circuit Court. *See DP Partners*, 106 F.3d at 673. This point is material to the Court's review because Hall admits that its motivation

and intent was to benefit its own economic self-interest and, accordingly, benefit brought to the estate was an indirect by-product of its "primary motivation . . . to further its own economic interest."

Notably contrary to the Fifth Circuit's conclusion, in the Northern District of Texas, at least one published opinion supports the proposition that intent is a factor in the § 503 analysis and that legal services provided solely for the benefit of a creditor or client are not compensable from the bankruptcy estate. *In re American 3001 Telecommunications, Inc.*, 79 B.R. 271, 273 (Bankr. N.D. Tex. 1987), *citing In re Richton International Corp.*, 15 B.R. 854, 856 (Bankr. S.D.N.Y. 1981). Unlike the Fifth Circuit Court's decision, that opinion finds additional support in the case law that a creditor's efforts undertaken solely to further its own self-interest will not be compensated, notwithstanding any incidental benefit accruing to the bankruptcy estate. *In the Matter of Cuisinarts, Inc.*, 115 B.R. 744, 750 (Bankr. D. Conn. 1990); *see also, e.g., In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988); *In re Automatic Spring Prod., Inc.*, 50 B.R. 6, 7 (Bankr. S.D. Fla. 1985); *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 565-69 (Bankr. D. Utah 1985). The Fifth Circuit's failure to even acknowledge such an abundance of contrary authority provides further support for this Court's grant of this Petition.

In *In re American 3001 Telecommunications, Inc.*, Judge Abramson noted that:

> The policy behind . . . section [503] is to encourage meaningful creditor participation in the reorganization process. *See e.g., In re Consolidated Bancshares, Inc.*, 785 P.2d 1249, 1253 (5th Cir. 1986). However, in general, "a creditor's attorney must ordinarily

> look to its own client for payment, unless the creditor's attorney rendered services an behalf of the reorganization, not merely on behalf of his client's interest, and conferred a significant and demonstrable benefit to the debtor's estate and to the creditors." Id., *quoting, In re General Oil Distributors,* 51 B.R. 794, 806 (Bankr. E.D.N.Y. 1985). The burden of proof of substantial benefit to the estate is squarely on the party claiming the expense. *In re 1 Potato 2, Inc.,* 71 B.R. 615, 618 (Bankr. D. Minn. 1987).

In re American 3001 Telecommunications, Inc., 79 B.R. 271, 273 (Bankr. N.D. Tex. 1987).

Legal services provided solely for the benefit of a creditor or client are not compensable from the bankruptcy estate. *In re American 3001 Telecommunications, Inc.,* 79 B.R. at 273, *citing In re Richton International Corp.,* 15 B.R. 854, 856 (Bankr. S.D.N.Y. 1981). Interestingly, the creditors in *Public Service Co. of N.H.* criticized that court's citation and reliance upon *American 3001 Telecommunications* because in that case Judge Abramson found the creditor was trying to purchase the debtor's assets at a discount and withdrew its competing plan when the price increased, to which criticism the New Hampshire bankruptcy court responded:

> These distinctions are not relevant to this Court's reference to *American* for the point that creditors competing in the plan process are usually acting primarily in their own self-interest, and if there is an ancillary benefit to the estate, it is incidental to the self-serving purpose of that creditor's involvement. The

> point is that the actual holding in *American* was to *deny* a § 503(b) claim of an unsuccessful bidder.
>
> * * *
>
> But rather than detract from the thrust of this Court's holding, [the factual distinctions in *American*] confirms the central belief that bidders act in their own economic self-interest. As Judge Abramson summed up: "In short, if *American* [the bidder] had been successful, the benefit would have accrued only to *American*, not to the creditors of the estate. Legal services provided solely for the benefit of a creditor or client are not compensable from the bankruptcy estate."

In re Public Service Co. of New Hampshire, 160 B.R. at 453 n. 68, 456 (emphasis in original).

Accordingly, the measure of a creditor's contribution in determining entitlement to Bankruptcy Code § 503(b) priority is the "direct" benefit flowing to the estate from effort expended by the applicant on behalf of all creditors. Such a test is necessary to balance the need to keep administrative expenses to a minimum, while promoting meaningful creditor participation in the reorganization process. *In re 9085 East Mineral Building, Ltd.*, 119 B.R. at 250; *In re Buttes Gas & Oil Co.*, 112 B.R. 191, 196 (Bankr. S.D. Tex. 1989); *In re U.S. Lines, Inc.*, 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989).

Similarly, as set forth above, case law is clear (outside the Fifth Circuit) that efforts undertaken by a creditor "solely to further his own self interest . . . will not be compensable,

notwithstanding any incidental benefit accruing to the bankruptcy estate." *In the Matter of Cuisinarts, Inc.*, 115 B.R. 744, 750 (Bankr. D. Conn. 1990); *In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988); *see also, In re Automatic Spring Prods., Inc.*, 50 B.R. 6, 7 (Bankr. S.D. Fla. 1985). This is because creditors are presumed to act primarily in their own self interest. *In re United States Lines, Inc.*, 103 B.R. 427 (Bankr. S.D.N.Y. 1989).

"Substantial contribution" claims must necessarily be examined in light of the type of participation in the reorganization process. The goal of 11 U.S.C. § 503(b) is to encourage meaningful creditor participation in the reorganization proceedings. *In re 9085 East Mineral Office Building, Ltd.*, 119 B.R. 246, 250 (Bankr. D. Colo. 1990). "Meaningful" creditor participation has been defined as involvement which "fosters" and enhances the administration of the estate. Active and extensive participation in a case in and of itself is not sufficient to justify an award of § 503(b) expenses. *In re D.W.G.K. Restaurants, Inc.*, 84 B.R. 684, 690 (Bankr. S.D. Cal. 1988). It is not enough that a benefit inures to the estate (at least outside of the Fifth Circuit). The test is whether those expenses were incurred in efforts which were intended by the creditor to benefit, and which did directly benefit, the estate. *In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988); *see also, In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 565-69 (Bankr. D. Utah 1985).

The record on review before this Court demonstrates an absence of any factual evidence presented by Hall that it did anything other than advance and protect its own interests. Its attorney, E.P. Keiffer, expressed on cross examination that his engagement was to advance Hall's economic benefit at every turn, not to look out for the other creditors of the estate or maximize their return. In addition, Keiffer admitted that causing Hall to take the five apartment projects was "the prime objective."

The evidence before the Bankruptcy Court below leads to only one conclusion — that Hall's primary motivation was the prosecution of its own claims and opportunity to purchase the Debtor's assets at a discount, rather than to benefit other creditors and promote a successful reorganization for any party other than Hall. When applicants act primarily in their own interests, any benefit arising therefrom to the Debtor's estate must necessarily be incidental, and does not constitute "direct" benefit to the estate. Where the benefit is only incidental, there is no "substantial contribution." *In re FRG, Inc.*, 124 B.R. 653, (Bankr. E.D. Pa. 1991); *In the Matter of Cuisinarts*, 115 B.R. 744 (Bankr. D. Conn. 1990); *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bankr. D. Utah 1985); *In re D.W.G.K. Restaurants, Inc.*, 84 B.R. 684 (Bankr. D. Cal. 1988). Nevertheless, the Fifth Circuit has adopted its own test, disregarding the law of other circuits, and determined that the creditor's motivation is now of very little, if any, relevance.

The Fifth Circuit's position essentially is that the test for "substantial contribution" should focus on the result of applicant's participation in the reorganization process, and not the motivation behind that conduct or the nature of that participation. If this argument were adopted, almost any post-petition creditor activity from which some benefit could be argued to flow to the estate might be entitled to administrative priority and payment from the estate. As the bankruptcy court in *DiBerto* stated, this would "increase total expenses exponentially" and diminish the assets available to unsecured creditors. *In re DiBerto,* 164 B.R. at 3. Clearly, that is not the intent of 11 U.S.C. §§ 503(b)(3)(D), (b)(4).

Accordingly, having split with other circuits and disregarded without acknowledgment contrary lower court opinions in its own circuit, the Fifth Circuit has misapplied the test for "substantial contribution," further undermining its flawed reasoning and opinion.

CONCLUSION

The Bankruptcy Court did not err in denying Hall's Fee Motion in part. However, it did commit error by not denying the entire request. Accordingly, the Fee Order of the Bankruptcy Court, to the extent it denies the Fee Motion, should have been affirmed and, to the extent it awards any amount to Hall, it should have been reversed and rendered against Hall.

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHRISTOPHER M. WEIL
Counsel of Record
ANTHONY A. PETROCCHI
Attorneys for Petitioners
1900 North Tower, L.B. 364
Plaza of the Americas
Dallas, Texas 75201
(214) 969-7272

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT DATED FEBRUARY 28, 1997

In the Matter of DP PARTNERS LTD. PARTNERSHIP, Debtor.

HALL FINANCIAL GROUP, INC., Appellant,

v.

DP PARTNERS, LTD. PARTNERSHIP; Sussex Properties, Inc., Appellees.

No. 95-11110.

United States Court of Appeals, Fifth Circuit.

Feb. 28, 1997.

* * *

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, and JOLLY and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:

This appeal requires the determination of the appropriate procedures for granting a creditor administrative fees, specifically attorney's fees, under 11 U.S.C. § 503 of the Bankruptcy Code. Concluding that the courts *a quo* erred in their construction of

that section we vacate the judgment appealed and remand for further proceedings consistent herewith.

Background

DP Partners Limited Partnership in 1993 filed a Chapter 11 petition after defaulting on note payments on real estate in Texas and Arizona.[1] DP filed its first plan of reorganization in February 1994, providing for approximately $37,000,000[2] in payments to its creditors. Hall Financial Group, recognizing that the proposed plan undervalued DP's property holdings, acquired three small unsecured claims, thus becoming a creditor.[3] HFG subsequently proposed a competing plan, setting off a bidding war. After several amendments the DP plan prevailed. Due in part to HFG's participation the final amended plan provided approximately $3,000,000 more for the creditors than the previous version.[4] In the process, however, HFG incurred $150,700 in attorney's fees.

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1. According to DP it filed for bankruptcy, with the approval of the creditor holding the notes, to modify the terms of approximately $65,000,000 in loans. A Chapter 11 proceeding was required for modification because certain loan restrictions prevented voluntary changes.

2. At or near the time Hall Financial Group joined the bidding DP amended its plan to provide for approximately $46,700,000 in payments.

3. DP contends that HFG bought into the bankruptcy so that it could bid on the apartment properties at bargain prices. According to DP, HFG "bought a ticket to an auction."

4. This figure conceivably might be as high as $12,500,000. Originally, the DP plan provided for $37,300,000 in payments. HFG responded with a plan providing for approximately $46,500,000 in payments. The DP plan that was finally confirmed provided for $49,800,000 in payments.

Appendix A

On September 15, 1994, after plan confirmation but before the administrative claim deadline, HFG moved for attorney's fees under 11 U.S.C. § 503(b)(3)-(4). DP timely objected. The bankruptcy court held a hearing and determined that HFG was entitled to only $12,500. The court stated that HFG would have been entitled to all of its fee claim had it given DP a "warning" before confirmation that it intended to seek such reimbursement. In the absence of such notice, the court reasoned, DP properly relied on the lack of a large administrative claim in formulating its plan. In so holding, the bankruptcy court relied on two New Hampshire cases which implied a notice requirement in 11 U.S.C. § 503.[5] Both HFG and DP appealed to the district court which summarily affirmed. On appeal to this court DP contends that the district court erred in affirming the $12,500 fee award because HFG waived its right to claim expenses and failed to make a substantial contribution warranting an award of fees and expenses. HFG contends that the district court erred in holding that 11 U.S.C. § 503 requires advance warning of administrative claims.

Analysis

Generally, 11 U.S.C. § 503 provides that "[a]fter notice and a hearing, there *shall* be allowed administrative expenses" for entities falling into certain categories.[6] In interpreting statutes, a court's function "is to construe the language so as to give effect to the intent of Congress."[7] The most compelling

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5. *In re Diberto*, 164 B.R. 1 (Bankr. D.N.H. 1993); *In re Public Serv. Co.*, 160 B.R. 404 (Bankr. D.N.H. 1993).

6. 11 U.S.C. § 503(b) (1993 & Supp. 1996) (emphasis added).

7. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940).

demonstration of congressional intent is the wording of the statute.[8] Use of the word "shall" connotes a mandatory intent.[9] The court is bound by the plain language of the statute especially where, as here, there is nothing in the statute or its legislative history to indicate a contrary intent.[10] Therefore, under the plain language of the statute, if HFG meets the requirements of section 503, it *shall* recover administrative expenses. This statutory mandate permits of no discretionary calls by the courts.

Section 503 first requires that HFG file a timely request for administrative expenses or be excused therefrom for cause.[11] Thereafter, following notice and a hearing, HFG must prove that its claimed expenses and fees are compensable under one or more subsections in section 503(b). Specifically at issue in this appeal are subsections (b)(3)(D) and (b)(4). Those two subsections, read in conjunction with section 503(b), provide that compensable administrative expenses include "the actual, necessary expenses . . . incurred by . . . a creditor . . . in making a substantial contribution in a case under chapter 9 or 11 of this title"[12] and "reasonable compensation for professional services

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8. *Id.*

9. *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977).

10. *Id.; see also Louisiana Credit Union League v. United States*, 693 F.2d 525 (5th Cir. 1982); *cf. Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (noting that where terms in a statute are unambiguous, courts must apply them as written).

11. 11 U.S.C. § 503(a).

12. 11 U.S.C. § 503(b)(3)(D).

rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection."[13] Thus, if HFG files a timely motion for administrative expenses falling into the above categories, the bankruptcy judge should determine the expenses that were actual, necessary expenses under subsection (b)(3)(D), and the amount of reasonable fees for professional services under subsection (b)(4).

Timely Filing for Administrative Expenses.

The question of the appropriate timing of a request for administrative fees and expenses is *res nova* for this court. Both the bankruptcy and district courts determined that HFG was required to give advance warning that it would seek a substantial administrative claim prior to confirmation,[14] relying primarily upon *In re Public Serv. Co.*[15] That case involved facts somewhat similar to the instant appeal in that a losing bidder in the plan confirmation process sought reimbursement for administrative fees incurred during the confirmation dispute. Initially the bankruptcy court denied the motion for fees, holding that the creditor failed to make a substantial contribution to the Chapter 11 proceedings. As an alternative holding, the bankruptcy judge determined that to be entitled to fees the creditor had to give

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13. 11 U.S.C. § 503(b)(4).

14. This novel, implied notice requirement is not to be confused with the notice required in 11 U.S.C. § 1129(a)(4). That provision requires a plan proponent to disclose its intent to recover fees and expenses through the plan it proposes. 11 U.S.C. § 1125(b) requires the plan proponent to disclose this intent in both its plan and the disclosure statement. HFG, as a plan proponent, complied with both of these statutes.

15. 160 B.R. 404 (Bankr. D.N.H. 1993).

advance warning of its intent to seek expenses to the court and the debtor "prior to the bidding process by an appropriate motion,"[16] reasoning that nondisclosure of large claims can potentially wreak havoc in the bidding process by making otherwise competitive plans economically unfeasible after confirmation. The court observed that scheming litigants might artificially inflate their bids in an attempt to escalate bidding, knowing that, at a minimum, their fees for the inflated, unrealistic bid would be reimbursed. In essence, the court apparently was impressed that the risk of noncompensation for administrative fees would provide a desirable check on fees and expenses and would keep bidding honest.

We find this well-intentioned attempt at equity to be at odds with the clear statutory language. Section 503 makes two references to the timing of requests for administrative fees. First, section 503(a) states that "[a]n entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause." This provision appears intentionally vague and broad. Legislative history reveals that Congress intended to leave the setting of specific filing deadlines to the Rules of Bankruptcy Procedure.[17] The Rules of Bankruptcy Procedure, in turn, largely defer that duty to the bankruptcy judges.[18] As a result, bankruptcy judges have, for

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16. *Id.* at 455.

17. *See* S.Rep. No. 989, 95th Cong., 2d Sess. 66 (1978) (stating that "the Rules of Bankruptcy Procedure will specify the time, the form, and the method of such a filing"), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5852; H.R.Rep. No. 595, 95th Cong., 1st Sess. 355 (1977) (same), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6311.

18. 3 *Collier on Bankruptcy* ¶ 503.1, at 503-4 n. 2c (Lawrence P. King ed., 15th ed. 1994) (noting that the Bankruptcy Reform Act of 1994 sets no time limit for filing administrative claims).

some time, been accorded discretion in setting administrative-claim bar-dates.[19] In the present case that deadline was 60 days after the effective date of the plan.

The second reference to the timing of requests for fees is found in section 503(b) which provides, "After notice and a hearing, there shall be allowed, administrative expenses . . . ." This notice requirement does not mandate "advance warning" of intent to file a claim for fees before plan confirmation processes begin. Rather, "after notice" merely refers to sending notice of the application and hearing on fees so that interested parties can contest their reasonableness. Succinctly stated, the section 503(b) notice requirement proscribes *ex parte* fee determinations — it does not require preconfirmation warning of intent to seek fees and expenses.

In the present case, no one disputes that HFG requested administrative fees and expenses well within the 60-day bar date for such claims. The Bankruptcy Code and Rules require nothing more. Further, nothing in the Bankruptcy Code and Rules suggested to HFG that after it made a substantial contribution, its claim for administrative fees and expenses would be barred by some implied advance warning requirement.

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19. *Id.* (noting that because nothing in the Bankruptcy Rules or Code sets deadlines for filing administrative claims, bankruptcy judges "may set such deadlines on a case by case basis"). Administrative expense claims are to be distinguished from other claims against the estate for which a creditor must timely file a proof of claim under 11 U.S.C. § 501. *See NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957 (5th Cir. 1991) (holding that an administrative expense claimant need not file a proof of claim under section 501 to be entitled to reimbursement of expenses incurred to benefit the debtor's estate), *cert. denied*, 502 U.S. 1032, 112 S.Ct. 873, 116 L.Ed.2d 778 (1992).

Appendix A

Substantial Contribution.

"[T]he policy aim of authorizing fee awards to creditors is to promote meaningful creditor participation in the reorganization process."[20] Thus, a claimant is entitled to administrative fees and expenses if these costs are incurred in making a substantial contribution to a Chapter 9 or 11 case. Generally, services which make a substantial contribution are those which "foster and enhance, rather than retard or interrupt the progress of reorganization."[21] Beyond that general statement, however, the concept of substantial contribution is not defined in this circuit. Though legislative history is of little help in divining a precise measure of substantial contribution, decisions from other circuits appear to distinguish between creditors' actions that "incidentally" benefit the estate and creditors' actions that directly and demonstrably benefit the estate.[22] In essence, these cases examine a creditor's motivation in expending the time and fees at issue: if a creditor is actively and exclusively pursuing its own self interest, any benefits accruing to the debtor's estate or other creditors are merely incidental benefits; these are not deemed substantial. DP relies heavily upon this theory in opposing HFG's request for additional fees. Indeed,

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20. *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1253 (5th Cir. 1986) (internal quotation marks omitted) (citations omitted).

21. *Id.* (internal quotation marks omitted) (citations omitted).

22. *See, e.g., Lebron v. Mechem Fin., Inc.*, 27 F.3d 937 (3d Cir. 1994); *In re Lister*, 846 F.2d 55, 57 (10th Cir. 1988) (holding that "[a]dministrative expenses . . . are compensable under 11 U.S.C. § 503(b)(3)(D), if those expenses are incurred in efforts which were intended to benefit, and which did directly benefit, the bankruptcy estate").

HFG concedes that its actions were motivated by economic self interest.

Initially, we note that nothing in the Bankruptcy Code requires a self-depreciating, altruistic intent as a prerequisite to recovery of fees and expenses under section 503. Rather, section 503 patently states that a creditor is entitled to actual and necessary expenses "incurred . . . in making a substantial contribution in a case under chapter 9 or 11." Finding no statutory definition and nothing in the entire statutory scheme or legislative history to indicate a contrary intent, we abide by the canon that words in a statute are to be given their "ordinary, everyday" meaning.[23] Thus, the phrase "substantial contribution" in section 503 means a contribution that is "considerable in amount, value or worth."[24] The benefits, if any, conferred upon

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23. *Crane v. Commissioner*, 331 U.S. 1, 6, 67 S.Ct. 1047, 1050-51, 91 L.Ed. 1301 (1947).

24. *Webster's Third New International Dictionary*, 2280 (4th Ed. 1976). Legislative history, albeit scant, also supports this construction:

> The phrase "substantial contribution in the case" is derived from Bankruptcy Act §§ 242 and 243. It does not require a contribution that leads to confirmation of a plan, for in many cases, it will be a substantial contribution if the person involved uncovers facts that would lead to a denial of confirmation, such as fraud in connection with the case.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 355 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6311. In the present case, HFG uncovered a fraudulent transfer, and its other actions led directly to the confirmation of a plan. HFG admits that these actions were motivated by self interest. Certainly, if Congress intended to withhold reimbursement for administrative expenses under these circumstances, at least some indication of that intent would appear in the statute or its legislative history.

an estate are not diminished by selfish or shrewd motivations. We therefore hold that a creditor's motive in taking actions that benefit the estate has little relevance in the determination whether the creditor has incurred actual and necessary expenses in making a substantial contribution to a case.

The development of a more concrete standard of substantial contribution is best left on a case-by-case basis. At a minimum, however, the court should weigh the cost of the claimed fees and expenses against the benefits conferred upon the estate which flow directly from those actions. Benefits flowing to only a portion of the estate or to limited classes of creditors are necessarily diminished in weight. Finally, to aid the district and appellate courts in the review process, bankruptcy judges should make specific and detailed findings on the substantial contribution issue.

In the present case, the bankruptcy court specifically found that HFG made a substantial contribution in DP's Chapter 11 case, stating that "HFG's participation in the case did benefit the Estate and make a substantial contribution in terms of (a) discovery of the fraudulent conveyance potential litigation and its benefit going to the secured creditor; (b) termination of exclusivity; and (c) causing the Debtor to change its plan." These findings are supported by the evidence and were not clearly erroneous. HFG's participation in the confirmation fight resulted in at least a $3,000,000 benefit to all creditors of the estate.

Determining Whether Claimed Expenses are Actual and Necessary, and Whether Professional Fees are Reasonable

Finally, claimants successfully complying with the foregoing requirements will have to prove that claimed expenses

were actual and necessary and that any fees are reasonable. Section 503(b)(3)(D) provides that compensable administrative expenses include "the actual, necessary expenses . . . incurred by . . . a creditor . . . in making a substantial contribution in a case under chapter 9 or 11."[25] This provision requires the bankruptcy judge to scrutinize claimed expenses for waste and duplication to ensure that expenses were indeed actual and necessary. It also requires the judge to distinguish between expenses incurred in making a substantial contribution to the case and expenses lacking that casual connection, the latter being noncompensable. Necessarily, the bankruptcy court enjoys broad discretion in making these determinations.[26]

A closely-related but separate provision is subsection (b)(4), authorizes an administrative fee award for professional services as follows:

> reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph 3 of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.[27]

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25. 11 U.S.C. § 503(b)(3)(D).

26. *In re Lister; see also In re Consolidated Bancshares* (holding that substantial contribution is a question of fact).

27. 11 U.S.C. § 503(b)(4).

This provision is expressly dependent upon a claimant qualifying for an administrative expense award in subsection (3), which requires that expenses, other than professional fees, be actual and necessary. Whether Congress intended to impose different standards by using the words "actual and necessary" in one provision and "reasonable" in another is unclear. The import of subsection (4), however, is clear. Congress intended for the judge to evaluate the listed factors in setting a reasonable fee. Because all of these factors are subsumed in the *Johnson v. Georgia Highway Express*[28] attorney's fees analysis, *Johnson* and progeny govern an award of fees in the present case.[29] This determination, like the inquiry in subsection (3), is a matter committed to the sound discretion of the bankruptcy court.[30]

Conclusion

HFG filed its claim by an appropriate motion before the administrative claim bar date. It is entitled to actual and necessary expenses incurred in making a substantial contribution to DP's Chapter 11 reorganization, including reasonable professional fees. We therefore VACATE the $12,500 fee award and REMAND for the setting of a fair and reasonable fee herein.

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28. 488 F.2d 714 (5th Cir. 1974).

29. *In re Lawler*, 807 F.2d 1207 (5th Cir. 1987).

30. *Id.; In re Lister.*

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION FILED NOVEMBER 3, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO
3:95-CV-0115-P

HALL FINANCIAL GROUP,

Appellant,

v.

DP PARTNERS LIMITED PARTNERSHIP and SUSSEX PROPERTIES, INC.,

Appellees.

MEMORANDUM OPINION and ORDER

Now before the Court are:

1. Brief of Appellant, Hall Financial Group, filed February 13, 1995;

2. Brief of Appellees, DP Partners Limited Partnership and Sussex Properties, Inc., filed March 14, 1995;

3. Reply Brief of Appellant, filed April 5, 1995; and

3. Reply Brief of Appellees, filed April 20, 1995.

Appendix B

Having fully considered the arguments, authorities, and record in this action the Court hereby AFFIRMS the Bankruptcy Court's Order entered November 14, 1994.

JURISDICTION and REVIEW

The Court exercises jurisdiction to hear and determine the issues presented on appeal pursuant to 28 U.S.C. § 158(a). A bankruptcy court's finding of fact are reviewed under the clearly erroneous standard. Bankruptcy Rule 8013; *Richmond Leasing Co. v. Capital Bank*, 762 F.2d 1303, 1308 (5th Cir. 1985). A bankruptcy court's conclusions of law are subject to *de novo* review. *Richmond Leasing*, 762 F.2d at 1308.

BACKGROUND

This appeal arises from the Chapter 11 bankruptcy of DP Partners Ltd. Partnership ("Debtor").[1] The Debtor, who owns and operates five apartment complexes in Texas and Arizona, filed its petition on October 15, 1993. In February 1994, the Debtor prepared a plan of reorganization and circulated it to the creditors. In April and May of 1994, Appellant Hall Financial Group ("HFG"), became a creditor of the Debtor's estate when it purchased three unsecured claims. HFG then submitted a competing plan of reorganization and disclosure statement. According to HFG, it submitted a plan when it recognized that "the Debtor's proposed plan undervalued the Debtor's assets and offered an unjustifiably small return to the creditors." The Debtor, however, contends that HFG became involved in the bankruptcy to advance its own economic interests in an attempt to purchase the Debtor's assets at a bargain price.

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1. Defendant Sussex Properties, Inc. ("Sussex") is the general partner of the Debtor.

Appendix B

The Bankruptcy Court approved both disclosure statements and sent the two competing plans of reorganization to the creditors for a vote. During the process, the Debtor modified its plan several times to increase the return to creditors and improve the plan's appeal. The Debtor's final modification outbid HFG, and the Bankruptcy Court confirmed the Debtor's Second Amended Plan for Reorganization as Modified on August 12, 1994.

After confirmation, HFG filed its Motion for Allowance of Fees and Expenses as an Administrative Claim ("HFG's Motion"), asserting a claim under Bankruptcy Code 503(b)(3)(D) and (b)(4) for reimbursement of $150,700 in administrative expenses. In the Motion, HFG asserted that it had made a substantial contribution in the case and that it was therefore entitled to reimbursement by the Debtor's estate for fees and expenses incurred in the confirmation fight.

On October 14, 1994, Bankruptcy Judge McGuire heard HFG's Motion and the Objection filed by the Debtor and Sussex. The Bankruptcy Court's Order was brief; it included seven findings of fact, and two conclusions of law:

Findings of Fact:

1. HFG's claim in this case under 503(b)(3)(D) and (b)(4) is allowed in the amount of $12,500.

2. There was no advance warning that HFG would make a $150,700 claim under 503(b)(3)(D) and (b)(4).

3. The Debtor relied on the fact that no significant 503 claims were in the wings in the composition of

prospective payment to the creditors and in raising money for confirmation purposes.

4. HFG's plan application should have been more candid in terms of the 50% fees to its counsel Burke & Wright, in the event of non-success by HFG.

5. HFG's participation in the case did benefit the Estate and make a substantial contribution in terms of a) discovery of the fraudulent conveyance potential litigation and its benefit going to the secured creditor; b) termination of exclusivity; and c) causing the Debtor to change its plan.

6. Contrary to Mr. Melton's testimony it appears HFG's plan has caused some specific modification to Debtor's Plan because it secured creditors and other creditors thereafter insisted on like changes in Debtor's plan.

7. If there had been advance warning of HFG's claim under 503 claiming an increased amount, in all likelihood it would have been allowed.

Conclusions of Law:

1. Advance notice must be given, as part of the confirmation/disclosure process that a substantial 503 claim is in the wrings. *See Public Service Company New Hampshire,* 160 B.R. 404 (Bankr. D.N.H. – 1993) and *In re DiBerto,* 164 B.R. 1 (Bankr. D.N.H. – 1993).

2. Advance warning is required to properly deal with the issues of feasibility and reliance and whether a Debtor

might have to otherwise lessen its payment to other creditors because of the claim.

It is from this Fee Order that HFG now appeals. Appellants argue that the Bankruptcy Court erred in disallowing the bulk of its fee request. The Debtor and Sussex have filed a response brief and cross-appeal. They contend that the Fee Award is improper and request that this Court reverse the portion of the Fee Order that awarded HFG $12,500.00 in administrative reimbursement.

ISSUES ON APPEAL

I. Was the Bankruptcy Court's finding that HFG's participation in the case made a substantial contribution clearly erroneous?

II. Was the Bankruptcy Court's finding that the Debtor relied on the absence of significant 503 claims clearly erroneous?

III. Based on these findings of fact, did the Bankruptcy Court err in its legal conclusion that as part of the confirmation/ disclosure process, advance notice of a substantial 503 claim must be given to the Debtor?

IV. Was the Bankruptcy Court's finding that HFG was entitled to $12,500 in fees clearly erroneous?

ANALYSIS

I. Substantial Contribution of HFG

On cross-appeal, the Debtor and Sussex argue that the

Appendix B

Bankruptcy Court erred in finding that HFG made a substantial contribution to the case, and therefore HFG's claim should be denied in full. The Debtor contends that HFG acted primarily in its own self-interest and for its "own economic benefit," and therefore "any contribution arising from HFG's conduct was indirect and not subject to reimbursement under Section 503(b)."

Bankruptcy Code § 503, the controlling statute, states in relevant part: "after notice and a hearing, there shall be allowed administrative expenses . . . including the actual, necessary expenses, incurred by a creditor . . . in making a substantial contribution in a case under chapter 9 or 11 of this title." 11 U.S.C. § 503. As provided in the statute, this Section allows for the recovery of expenses related to creditor participation in a case only to the extent such efforts have resulted in a substantial contribution to the advancement of the bankruptcy case. *In re Speeds Billiards & Games, Inc.*, 149 B.R. 434, 437 (Bankr. E.D. Tex. 1993).

The policy behind this Section is to encourage meaningful creditor participation in the reorganization process. *In re American 3001 Telecommunications*, 79 B.R. 271, 273 (Bankr. N.D. Tex. 1987). Such awards are not lightly accorded, and the case law is clear that a prerequisite to an award under § 503 is a demonstration by the claimant that their efforts have resulted in an actual and demonstrable benefit to the bankruptcy estate. *Id.; Matter of Consol. Bancshares, Inc.*, 785 F.2d 1249, 1253 (5th Cir. 1986). Such a demonstration is necessary to overcome the presumption that the creditor's involvement in the bankruptcy case is motivated solely by self-interest. *Id.*

A creditor who has made a substantial contribution to a case is entitled to an administrative expense award even if that

creditor's involvement in the case is not motivated by altruism. *Speeds Billiards*, 149 B.R. at 437.[2] Although a creditor's attorney must ordinarily look to its own client for payment, according to the Fifth Circuit, the substantial contribution test is satisfied if the creditor's attorney rendered services on behalf of his client's interest, *and* conferred a significant and demonstrable benefit to the debtor's estate and the creditors." *Consol. Bancshares*, 785 F.2d at 1253, *citing In re Gen. Oil Distrib.*, 51 B.R. 794, 805 (Bankr. E.D.N.Y. 1985) (emphasis added).

Whether an applicant has made a "substantial contribution" is a question of fact to be determined by a bankruptcy court. *Consol. Bancshares*, 785 F.2d at 1253. What constitutes "substantial contribution" is within a bankruptcy court's "informed discretion." *In re 9085 E. Mineral Building, Ltd.*, 119 B.R. at 246, 249 (Bankr. D. Colo. 1990); *Matter of Baldwin-United Corp.*, 79 B.R. 321 (Bankr. S.D. Ohio 1987).

In this case, the Bankruptcy Judge found that HFG's extensive participation had made a substantial contribution in at least three ways. First, Judge McGuire found that HFG's efforts contributed to the "discovery of the fraudulent conveyance potential litigation and its benefit going to the secured creditor." Second, the Bankruptcy Court found that HFG had benefitted the bankruptcy process with regard to the termination of exclusivity. After HFG became a creditor, it

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2. On the issue of a creditor's motivation, the court in *In re 1 Potato 2, Inc.*, 71 B.R. 615, 618 n. 3 (Bankr. D. Minn. 1987), ruled that a creditor's motive in proposing to take over the debtor is not relevant, and that the primary concern should be the value of the contribution to the estate. However, in *American 3001*, 79 B.R. at 273, the court suggested that motivation of a creditor may be one of the relevant considerations.

secured a Bankruptcy Rule 2004[3] examination of the Debtor, and filed a Motion for Termination of Debtor's Exclusive Period, on May 12, 1994. Appellant's Designations, Vol. II, Doc. No. 24. On May 26, 1994, the Bankruptcy Court granted HFG's Motion, and terminated the Debtor's exclusivity period. Order Granting Motion for Termination of Debtor's Exclusive Period, Appellant's Designations, Vol. II, Doc. No. 21. Third, the Bankruptcy Court found that HFG's participation played a direct role in "causing the Debtor to change its plan." It is significant that HFG's proposed plan offered the creditors nearly $2 million more than the plan initially proposed by the Debtor. In the end, the Debtor's final confirmed Plan paid approximately $3 million more than the Debtor originally proposed.

Additionally, the Bankruptcy Court made a finding of fact that "contrary to Mr. Melton's testimony it appears HFG's plan has caused some specific modifications to Debtor's plan because its secured creditors and other creditors thereafter insisted on like changes in Debtor's plan."

Despite the fact that HFG stood to gain by its involvement in the reorganization process, it is clear that the benefit which they helped to derive did not accrue simply to HFG, but to the other creditors of the estate as well. In sum, there is sufficient evidence in the record to support Judge McGuire's finding that HFG's involvement conferred a direct and demonstrable benefit to the estate that amounted to a substantial contribution.

---

3. In relevant part, this section provides that "on the request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period of the 180-day period referred to in this section." 11 U.S.C. Section 1121(d).

Appendix B

II. Debtor's Reliance

In another finding of fact, the Bankruptcy Court concluded that "the Debtor relied on the fact that no significant section 503 claims were in the wings in the composition of prospective payment to the creditors and in raising money for confirmation purposes." Appellant HFG urges that this conclusion is clearly erroneous. However, the Court finds that there is sufficient evidence in the record to support the Bankruptcy Court's finding that the Debtor relied on the lack of a substantial claim under § 503. As such, the Bankruptcy Court's finding was not clearly erroneous.

For example, Mr. Keiffer, counsel for HFG, testified for HFG at the Fee Motion hearing and admitted that during the disclosure and confirmation process, HFG gave the Debtor little or no indication that it would seek administrative expenses.[4] In

---

4. Q: You didn't examine any witnesses with respect to feasibility concerning administrative claims?

   A: No.

   Q: You didn't mention in parting that there were administrative claims and you had better consider the fact that we're going to come up with ... more than a hundred thousand dollars in administrative claims, isn't that so?

   A: That is correct.

   Q: And you would say, in fairness, you never hinted, you never said and you never wrote anybody, there was an expectation that a competing plan

(Cont'd)

addition, Judge McGuire questioned Mr. Keiffer at the Fee Motion hearing as to when HFG first considered filing a Section 503 claim.[5] This testimony suggests that the Debtor could not have received notice that HFG was planning to submit a substantial 503 claim, and that the Debtor relied on that fact when developing its plan of reorganization.

More importantly, the evidence in the record shows that the Debtor's confirmed plan did not contain a provision for the payment of a substantial administrative claim by a defeated plan

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(Cont'd)

proponent would seek administrative expenses in this case.

A: No.

Tr. p. 108, 109.

5. Q (The Court): When was the first time that you contemplated the possibility of a 503 claim?

A: Upon reviewing some of the case law, after the confirmation hearing had been concluded, reading some of the case law in regard to 503(b)(4) had not contemplated prior to that date.

Q (Mr. Weil): Well, I didn't get the date, Your Honor.

A: After the confirmation hearing and reviewing just some cases, had never contemplated filing a 503(b) particularly until shortly after confirmation and reading some cases.

Tr. p. 132-33.

proponent. Section 5.02 of the Debtor's confirmed plan estimated all administrative expense claims to be $20,000. Second Amended Plan of Reorganization, Section 5.02, Appellee's Designations, Doc. No. 12.

After reviewing the record, weighing the testimony, and determining the credibility of witnesses, the Bankruptcy Judge concluded that the Debtor relied on the absence of a large § 503 claim. As there is evidence in the record to support this conclusion, this Court will not overrule Judge McGuire's finding as clearly erroneous.

III. Advance Notice to a debtor of a § 503 Claim

Based on these findings of fact, the Bankruptcy Court concluded that HFG should have notified the Debtor either before or after the disclosure statement hearing, or before the confirmation hearing, that HFG would assert a substantial claim for $150,000 under § 503.

Again, Bankruptcy Code § 503 provides the mechanism for seeking reimbursement for administrative fees. That Section reads:

> (a) An entity may file a request for payment of an administrative expense.
>
> (b) After notice and a hearing, there shall be allowed administrative expenses . . . including
>
> > (3) the actual, necessary expenses, incurred by —

> (D) a creditor, an indentured trustee, an equity shareholder or a committee representing creditors or equity security holders ... in making a substantial contribution in a case under chapter 9 or 11 of this title.
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of any entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant. 11 U.S.C. 503(a), (b)(3)(D), (b)(4).

The Bankruptcy Court found that "in order to properly deal with the issues of feasibility and reliance," HFG, as the unsuccessful plan proponent, should have given notice to the Debtor that a substantial § 503 claim would be asserted. In reaching this legal conclusion, Judge McGuire relied on *Public Service Company New Hampshire*, 160 B.R. 404 (Bankr. D.N.H. 1993) and *In re DiBerto*, 164 B.R. 1 (Bankr. D.N.H. 1993). These cases, although recent and emanating from the same court, are directly on point, and remain good law. The Bankruptcy Court committed no error of law in citing and applying these cases.

Appendix B

Public Service involved the bankruptcy of an electric power company in New Hampshire. Several companies competed for the right to reorganize the debtor, and United Illuminating Company ("UI") was one of the losing bidders. 160 B.R. at 407. After the plan of reorganization was confirmed, UI filed an application for allowance of a $2,980,000 administrative claim under Bankruptcy Code Sections 503(b)(3)(D) and (b)(4). *Id.* at 451. Therefore, the question presented to the *Public Service* court was "whether [the 503 claimant], as unsuccessful bidder for the assets of [debtor], is entitled to recover fees under section 503 of the Bankruptcy Code."

The Judge in *Public Service* answered this question in the negative, finding that UI's disclosure statement did not contain "the kind of before-the-fact adequate disclosure and request for approval necessary to put the parties, and for that matter, the Court on notice that UI would in fact request a section 503(b)(3)(D) or (b)(4) compensation in the event that it turned out to be the losing bidder, and to establish any right of UI to assert such a claim." 160 B.R. at 454.

Most notably, the Court continued by stating that "in fact, no case cited by UI, nor any case that this Court is aware of, has ever held that a losing bidder is entitled to a benefit-the-estate fee or a break-up fee if that right was not established by court order before the auction. The cases that have actually touched on the issue have denied such claims." *Id.* at 455, *citing In re FRG, Inc.*, 124 B.R. 653 (Bankr. E.D. Pa. 1991) (applicants request for compensation of $85,000 denied); *In re Lister*, 846 F.2d 55 (10th Cir. 1988) (application for administrative expenses by creditor who did not have prior court approval to act for estate denied by Bankruptcy Court, denial affirmed by Court of Appeals).

Appendix B

The court in *DiBerto* observed that "the genius of chapter 11 of the Bankruptcy Code is to force a complete disclosure and quantification of all liabilities against the estate so that a meaningful reorganization plan can be negotiated and confirmed." 164 B.R. at 4 n. 4. Contrary to this policy, the court found that the disclosure statement that went out to creditors before they voted on the plan contained no mention of the fact that the § 503 claimants would seek substantial administrative fees. *Id.* at 3. In addition, there was "no indication in the record that the § 503 claimants ever raised that contention to the Debtor and to this Court prior to the entry of the confirming order." *Id.*

Similarly, in this case, Judge McGuire found that HFG's Plan application should have been more candid in terms of the 50% fees to its counsel Burke & Wright, in the event of non-success by HFG. Judge McGuire, as did Judge Yaco in *Public Service,* found it significant that the Debtor had insufficient notice of a substantial 503 claim, and that the Debtor proceeded through the bankruptcy process on the assumption that the unsuccessful plan proponent would not seek a large administrative claim under § 503.

Like the 503 claimant in *Public Service,* HFG has not cited any authority for the proposition than an unsuccessful bidder in a bankruptcy reorganization is entitled to a benefit-the-estate fee under § 503, if that right was not established by court order. The Court is satisfied that both *Public Service* and *DiBerto* are directly applicable to the case at hand, are good law, and were correctly applied by the Bankruptcy Judge.

IV. $12,500 Administrative Fee Award

In reviewing an administrative fee awarded by a bankruptcy

court under § 503, the court in *Consol. Bancshares* observed that ". . . bankruptcy judges have broad discretion in determining the amount of attorneys' fees to award as compensation for services performed in connection with bankruptcy proceedings, and their exercise of that discretion will not be disturbed by an appellate court absent a showing that it was abused." 785 F.2d at 1252.

There is no evidence in this case that Judge McGuire abused his discretion. The Judge was intimately familiar with the history of this case, the parties, and the issues involved. Additionally, in connection with this Fee Motion, the Court heard the testimony, adjudged the credibility of witnesses, and the worthiness of the claim. His conclusion to award $12,500 in fees to HFG is not clearly erroneous, and will not be set aside by this Court.

CONCLUSION

For the foregoing reasons, the court concludes that the Bankruptcy Court's findings of fact were not clearly erroneous, and its conclusions of law were correct. The decision of the Bankruptcy Court is AFFIRMED.

So Ordered.

Signed this 3rd day of November 1995.

s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION ENTERED NOVEMBER 14, 1994

E.P. Keiffer
State Bar No. 11181700
Burke & Wright, P.C.
2900 Renaissance Tower
1201 Elm Street
Dallas, TX 75270-2102
(214) 742-2900

ATTORNEYS FOR HALL
FINANCIAL GROUP, INC.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

DP PARTNERS LTD PARTNERSHIP

DEBTOR.

CASE NO. 394-31738-RCM-11

ORDER PARTIALLY ALLOWING HALL FINANCIAL GROUP,, INC.'S MOTION FOR ALLOWANCE OF FEES AND EXPENSES AS AN ADMINISTRATIVE CLAIM

CAME ON TO BE HEARD Hall Financial Group, Inc.'s ("HFG"), Motion for Allowance of Fees and Expenses as an Administrative Claim under Bankruptcy Code §§ 503 (b)(3)(D)

and (b)(4) (the "Motion"). The Court, after noting that due notice of the Motion had been given, and after considering the evidence adduced at the hearing finds that just cause exists to enter this Order partially allowing HFG an administrative claim in the amount of $12,500. The Court's findings of fact and conclusions are specifically stated in a separate order. It is, therefore,

ORDERED that the Debtor is required to pay HFG the sum of $12,500 as an allowed Administrative Claim under the Debtor's plan.

SO ORDERED.

SIGNED this 7 day of November, 1994.

s/ Robert C. McGuire
ROBERT C. McGUIRE,
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION ENTERED NOVEMBER 14, 1994

E.P. Keiffer
State Bar No. 11181700
Burke & Wright, P.C.
2900 Renaissance Tower
1201 Elm Street
Dallas, TX 75270-2102
(214) 742-2900

ATTORNEYS FOR HALL
FINANCIAL GROUP, INC.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

DP PARTNERS LTD PARTNERSHIP

DEBTOR.

CASE NO. 394-31738-RCM-11

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CAME ON TO BE HEARD Hall Financial Group, Inc.'s ("HFG"), Motion for Allowance of Fees and Expenses as an Administrative Claim under Bankruptcy Code §§ 503 (b)(3)(D) and (b)(4) (the "Motion"). The following are the Courts findings of fact and conclusions of law.

Appendix D

Findings of Fact

1. HFG's claim in this case under § 503 (b)(3)(D) and (b)(4) is allowed in the amount of $12,500.

2. There was no advance warning that HFG would make a $150,700 claim under § 503 (b)(3)(D) and (b)(4).

3. The Debtor relied on the fact that no significant § 503 claims were in the wings in the composition of prospective payment to the creditors and in raising money for confirmation purposes.

4. HFG's claim application should have been more candid in terms of the 50% fees to its counsel Burke & Wright, in the event of non-success by HFG.

5. HFG's participation in the case did benefit the Estate and make a substantial contribution in terms of a) discovery of the fraudulent conveyance potential litigation and its benefit going to the secured creditor; b) termination of exclusivity; and c) causing the Debtor to change its plan.

6. Contrary to Mr. Meltons' testimony it appears HFG's plan has caused some specific modification to Debtor's plan because its secured creditors and other creditors thereafter insisted on like changes in Debtor's plan.

7. If there had been advance warning of HFG's claim under § 503 claiming an increased amount, in all likelihood it would have been allowed.

Appendix D

Conclusions of Law

1. Advance notice must be given, as part of the confirmation/disclosure process that a substantial § 503 claim is in the wings. See *Public Service Company New Hampshire,* 160 B.R. 404 (Bankr. D. N.H. - 1993) and *In re DiBerto,* 164 B.R. 1 (Bankr. D.N.H. - 1993).

2. Advance warning is required to properly deal with the issues of feasibility and reliance and whether a Debtor might have to otherwise lessen its payment to other creditors because of the claim.

SO ORDERED.

SIGNED this 7 day of November, 1994.

s/ Robert C. McGuire
ROBERT C. McGUIRE,
UNITED STATES BANKRUPTCY JUDGE

(2)

No. 96-1919

Supreme Court, U.S.
FILED
JUL 3 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DP PARTNERS, LIMITED PARTNERSHIP and SUSSEX PROPERTIES, INC.,

Petitioners,

vs.

HALL FINANCIAL GROUP, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

E. PAUL KEIFFER
Counsel of Record
ROBERT A. SIMON
FRANK J. WRIGHT
BURKE, WRIGHT & KEIFFER, P.C.
Attorneys for Respondent
2900 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2102
(214) 742-2900

71237
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

40 pp

QUESTIONS PRESENTED

I. May an unsuccessful proponent of a competing plan of reorganization in a bankruptcy proceeding be found to have waived its right to reimbursement for administrative expenses under 11 U.S.C. §§ 503(b)(3)(D), (b)(4), if that unsuccessful plan proponent fails to disclose its intention to make a claim prior to confirmation of the debtor's plan of reorganization?

II. Does the use of the word "shall" in the language of § 503(b) preclude a bankruptcy court from determining that a previously undisclosed administrative claim of an unsuccessful plan proponent is untimely, if filed within the claims bar date but after confirmation of the plan of reorganization?

III. Having determined that the administrative claim of the unsuccessful plan proponent is untimely, does a bankruptcy court commit error by then allowing any portion of that claim?

IV. Did the Fifth Circuit Court of Appeals adopt an incorrect interpretation of "substantial contribution" under 11 U.S.C. § 503 by disregarding the relevance of intent and motivations of the creditor in its role as a proponent of a competing plan of reorganization?

INTERESTED PARTIES

Petitioners:

DP Partners, Limited Partnership
Sussex Properties, Inc.
2626 Cole Avenue, Suite 400
Dallas, TX 75204

Christopher M. Weil
Anthony A. Petrocchi
Weil & Petrocchi
Lock Box 364
1900 North Tower
Plaza of the Americas
Dallas, TX 75201

Attorneys for Petitioners

Respondent:

Hall Financial Group, Inc.
750 N. St. Paul, Suite 200
Dallas, TX 75201

E. Paul Keiffer
Robert A. Simon
Frank J. Wright
Burke, Wright & Keiffer, P.C.
2900 Renaissance Tower
1201 Elm Street
Dallas, TX 75270-2102

Attorneys for Respondent

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Appendix C — Exhibit from the Plan Confirmation Hearing 12a

Hall Financial Group, Inc., ("HFG"), Respondent, files this its Brief in Opposition, asking this Court to deny DP Partners Limited Partnership's Petition for Writ of Certiorari (the "Petition") to review the judgment of the United States Court of Appeals for the Fifth Circuit, filed on May 31, 1997. The opinion of the Fifth Circuit, entered on February 28, 1997, is reported at 106 F.3d 667 (5th Cir. 1997). It is reprinted in the Petition at Appendix A.

STATUTES INVOLVED

11 U.S.C. § 503(b)(3)(D) and (b)(4):

> Allowance of administrative expenses
>
> (b) After notice and hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including —
>
> * * *
>
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by —
>
> * * *
>
> (D) a creditor, indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a

> substantial contribution in a case under chapter 9 or 11 of this title;
>
> * * *
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

STATEMENT OF JURISDICTION

The Petition asserts that the granting of certiorari is proper under 28 U.S.C. § 1254(1) and Sup. Ct. R. 10(a) and (c). However, DP Partners Limited Partnership ("DPP"), the Petitioner, failed to seek appellate review of the issues encompassed in Questions III and IV at the Fifth Circuit. (*See* Appendix A, the docket on appeal from the District Court to the Fifth Circuit. Petitioner did not cross-appeal on any issue decided by the District Court; Appendix B to the Petition, the opinion of the District Court upholding the Bankruptcy Court's findings that Respondent had made a substantial contribution to the debtor's estate). Nonetheless, the Fifth Circuit examined the issue of what bearing intent should have on whether an administrative claim for substantial contribution should be awarded under 11 U.S.C. § 503(b)(3)(D).

STATEMENT OF THE CASE

HFG generally agrees with DPP's Statement of the Case, save for the editorial comments on HFG's motivation and the complaint that HFG was seeking to secure the assets of DPP at a bargain price.[1] Those characterizations are denied. HFG also denies that it purchased claims solely to make a bid to State Street Bank. HFG purchased claims to file a competing plan of reorganization. HFG did so because DPP's then existing plan of reorganization grossly undervalued the assets of the debtor and did not provide a fair return for creditors in the case. The case presented an opportunity for HFG to reorganize the debtor entity, acquire control of five properties, and still give the creditors a far better return than DPP offered. HFG notes that its plan of reorganization notified parties in interest that HFG would seek recovery of its fees and expenses if its plan were confirmed.

The opinion of the Fifth Circuit answered two questions raised by HFG: a) is there a requirement that a creditor give advance warning, before the deadline for administrative claims, that it will seek an administrative claim for a substantial contribution under 11 U.S.C. §§ 503(b)(3)(D) and (b)(4); and (b) once the Bankruptcy Court finds that a creditor has made a substantial contribution, does the Court have discretion to award less than the reasonable and necessary fees and expenses that the creditor incurred to achieve the substantial contribution. DPP argued in their brief and at oral argument to the Fifth Circuit that HFG's self-interested motivation absolutely foreclosed a finding of substantial contribution. DPP never argued to the Fifth Circuit or to the District Court that the Bankruptcy Court, the fact finder, applied the wrong standard to the facts presented when it found that HFG had made a substantial contribution.

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1. The Bankruptcy Court found that HFG's participation in the case caused more money to be paid to the creditors of the DPP bankruptcy estate. The District Court and the Fifth Circuit left that finding undisturbed.

REASONS FOR DENYING THE WRIT

SUMMARY

DPP asserts two bases for review. The first concerns DPP's assertion that the Bankruptcy Court can retroactively require advance notice of a substantial contribution claim, during the Chapter 11 plan confirmation process. DPP asserts that, despite HFG's compliance with the requirements of § 503(b) and HFG's compliance with the administrative bar date set forth in the order of confirmation, HFG's failure to give advance notice of its substantial contribution claim is grounds for denial of such a claim. DPP argues that the Bankruptcy Court can have an unwritten bar date as to one type of administrative claim, substantial contribution claims, that does not appear in the Bankruptcy Code or in the Rules of Bankruptcy Procedure. The petition argues that the issue is exceptionally important to the integrity of the Chapter 11 plan confirmation process. It is not. The Fifth Circuit's opinion correctly applies the language of the statute. There is no conflict among the Circuits on the issue of advance notice. The position taken by other Bankruptcy Courts on an advance notice requirement is not a conflict amongst the Circuits. There is no basis for discretionary review.

The second issue DPP raised is whether the Fifth Circuit adopted an erroneous standard for determining whether a creditor made a substantial contribution for purposes of 11 U.S.C. § 503(b)(3)(D). The Fifth Circuit opined that the creditor's intent was of little consequence in such a determination. However, the Fifth Circuit's opinion on the question of intent was not crucial to upholding the Bankruptcy Court's determination. The Fifth Circuit left the Bankruptcy Court's substantial contribution fact finding intact because the finding was not clearly erroneous, not because the Bankruptcy Court used the standard as articulated by the Fifth Circuit.

Nothing indicates that the Bankruptcy Court used an improper standard. The case law authority in DPP's Petition was presented to the Bankruptcy Court. Based upon the case law, the Bankruptcy Court found that HFG had made a substantial contribution. The District Court had the benefit of the same decisions in upholding the finding of a substantial contribution. The District Court stated that the evidence showed that HFG had overcome the presumption that the creditor's involvement in the case was motivated by self-interest. (*See* Appendix B to the Petition). DPP's substantive argument is that the Bankruptcy Court used the proper legal standard but reached an erroneous factual conclusion. There is nothing for this Court to review as to whether the Bankruptcy Court's specific finding of fact of a substantial contribution is proper.[2]

Finally, the Fifth Circuit did not adopt a new standard. It merely expressed the existing standard in a different way. The Fifth Circuit's position is consistent with the position taken by other Circuit Courts.

I.

THERE IS NO CONFLICT AMONGST THE CIRCUIT COURTS OF APPEAL AS TO THE CONSTRUCTION OF §§ 503(b)(3)(D) AND (b)(4) AND AS TO WHETHER THERE IS A REQUIREMENT OF ADVANCE NOTICE BEFORE CONFIRMATION THAT CREDITOR WILL ASSERT A SUBSTANTIAL CONTRIBUTION CLAIM.

DPP cites no Circuit level case law authority, nor is there any Circuit level authority, for DPP's argument that the Bankruptcy Court can impose, retroactively, a requirement that

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2. Sup. Ct. R. 10 states that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

an administrative claim for substantial contribution be disclosed before confirmation. Without a conflict among the Circuit Courts on this point, DPP is not entitled to review[3], unless it can meet one of the other requirements of 28 U.S.C. § 1254 and Sup. Ct. R. 10.

DPP points out that the Fifth Circuit stated that the Bankruptcy Court has discretion in setting an administrative bar date. DPP uses this statement to argue that the Bankruptcy Court can impose retroactively an unpublished and undisclosed requirement that a prospective administrative claimant must give notice of its claim before approval of the disclosure statement or plan confirmation. When the Fifth Circuit stated that the Bankruptcy Court had discretion in setting an administrative bar date, it meant just that, *setting* a bar date. All Circuits agree that a Bankruptcy Court has the power to set an administrative bar date for substantial contribution claims before the end of the confirmation process. What the Fifth Circuit has stated is that there are no implied bar dates. A bar date must be set forth explicitly in a published rule or in an order. There are no Circuit cases that hold that a Bankruptcy Court can enforce an implied bar date.

Prior to the hearing on the disclosure statement, there was no bar date. The Bankruptcy Court could have set one, but since DPP did not seek a bar date, the Bankruptcy Court did not do so. Prior to the plan confirmation hearing there was no bar date set for administrative claims. DPP did not seek one. The Bankruptcy Court could have set one. However, DPP did not

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3. Rule 10 does not restrict this Court's power to conflicts between the Circuits, but conflicts with lower level courts rarely will justify review by this Court: "[only] in very rare instances, will a conflict between a decision of the Court of Appeals and that of a district court [or its unit the bankruptcy court] in some other circuit suffice" Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 548 (1958).

ask. Since DPP did not seek a pre-confirmation bar date for administrative claims, the Bankruptcy Court did not impose one. The bar date for administrative claims was set by the provisions by the order confirming the plan. (*See* Appendix B, the applicable section of the confirmation order). HFG followed all of the stated and noted prerequisites by timely filing its administrative substantial contribution claim.

II.

A PLAIN READING OF THE NOTICE AND HEARING REQUIREMENTS OF § 503(b), IN THE CONTEXT OF A CHAPTER 11, DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW[4].

DPP argues that not having an unwritten, implied bar date for filing an administrative claim for making a substantial contribution to the case presents an important question of federal law because the Bankruptcy Court, the creditors, and the debtor or plan proponent will not know what amount of funding will be necessary to make the plan confirmable. DPP states that non-disclosure will wreak havoc on the plan confirmation process. DPP asserts that the Bankruptcy Court cannot determine plan feasibility without mandatory pre-confirmation disclosure of substantial contribution claims. DPP states that substantial contribution claims should be made known or the integrity of the plan process will suffer. DPP argues that the potential claimant is required to disclose its intent to file such a claim or lose the right to seek such an award.

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4. It should be noted that the Fifth Circuit, in its discussion of § 503(a), cited the post October 1994 version of § 503(a). The applicable version of § 503(a) in the case at bar does not state "timely" or "or tardily file such request if permitted by the court for cause." The DPP case was filed in 1993 in Phoenix, Arizona, as Case No. 93-10672 and then transferred to Dallas, Texas, in March of 1994, as Case No. 394-31738 upon a change of venue motion by the secured lender.

DPP asserts that bankruptcy policy imposes upon those who have made a substantial contribution to a case a duty of disclosure, principally because the Debtor has to meet disclosure requirements. If I must, you must. DPP cites no statutory authority for the requirement. It would be more convenient for plan proponents if the Bankruptcy Code required all administrative claimants to disclose their claims before confirmation. However, neither the Bankruptcy Code nor the Rules imposes such a requirement. Congress chose not to impose that requirement on administrative claimants. The only authority that DPP presents is authority applicable to the plan proponent's requirements and case law from a few Bankruptcy Courts.

The case at bar does not concern important federal policy. The problem was DPP failed to seek out information. There were adequate means for DPP to learn the information needed to determine the feasibility of its plan. However, the plan proponent must use the tools provided, the Bankruptcy Code and the Rules. The ability of a creditor to seek a substantial contribution claim is statutorily granted and therefore is assumed to be known. The fact that a competing plan has raised the ante by millions of dollars is a sufficient hint that a substantial contribution claim may be forthcoming and that the plan proponent should prepare for such an eventuality[5]. If the plan proponent, in light of another creditor taking pains to find potential fraudulent transfers to insiders and affiliates of the debtor, fails to inquire about the fees that the creditor has incurred and specifically to ask if a claim for same will be filed, then the plan proponent has not done its job. The plan proponent has the means to inquire and the duty to find out so that it may disclose the information to creditors. If the creditor denies the intent to seek such a claim,

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5. As set forth in the Fifth Circuit's opinion at Appendix A of the Petition, HFG in its disclosure statement and plan, provided for the payment of attorneys fees for HFG's counsel and debtor's counsel, after a fee application hearing with proper notice.

the plan proponent establishes an estoppel defense. Additionally, the plan proponent can request that the Bankruptcy Court set a bar date for disclosing the intent to file administrative claims for substantial contribution. Substantial contribution claims are not barred merely because the plan proponent failed to use the tools provided to ascertain their amount. No other kinds of administrative claims are barred because they were not disclosed or because the plan proponent failed to ascertain them.[6] More importantly, the plan proponent's lack of diligence does not create an important question of federal law.

DPP complains that HFG should have objected to the feasibility of DPP's plan because the plan did not address substantial contribution claims. DPP confuses points here. HFG never stated that DPP's plan was not feasible because it did not provide for a substantial contribution claim. HFG would be estopped to use that specific infirmity, were it to exist.[7] Most importantly, the failure to object, as with the other asserted sins of HFG, is not a basis for granting review by this Court. The issue is whether or not having an implied, unpublished, and unknown bar date on substantial contribution claims is such an intolerable state of affairs under federal bankruptcy law that this Court should take up the issue. There are no conflicts in the Circuits on this issue. Moreover the notice requirement urged by DPP is not present in a plain reading of the § 503(b) or elsewhere in the Bankruptcy Code. DPP, and parties in their position, have the means to secure the information or compel the filing of claims during the initial stages of the confirmation process.

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6. A plan proponent's fees and expenses are different. The proponent knows what his fees and expenses are or what they likely will be. The plan proponent is obligated to disclose them.

7. Appendix C is an exhibit from the Plan Confirmation hearing that shows that the new partners were willing to put up $200,000 towards legal and other fees. There never was a feasibility issue in this case.

III.

THERE IS NO ISSUE BEFORE THIS COURT ON WHETHER HFG MADE A SUBSTANTIAL CONTRIBUTION IN THE DPP CASE.

DPP seeks review of the Fifth Circuit decision that a creditor's intent or motivation is not relevant to whether the creditor made a substantial contribution in the case. DPP failed to preserve any error on that issue. DPP does not seek review of the determination that HFG made a substantial contribution in that case, as found by the Bankruptcy Court and as sustained on cross-appeal by the District Court. The Fifth Circuit noted that the findings made by the Bankruptcy Court were not clearly erroneous. The Fifth Circuit was not asked to review the finding of substantial contribution. The underlying basis for the finding of substantial contribution by the Bankruptcy Court was not reviewed. DPP did not present the issue of whether the Bankruptcy Court applied the proper standard in finding that HFG made a substantial contribution. DPP has never argued that the Bankruptcy Court applied the wrong standard in finding that HFG made a substantial contribution. DPP has not presented an issue in its Petition that the Bankruptcy Court applied an improper standard in finding that HFG made a substantial contribution.

The standard by which the Bankruptcy Court determined that HFG had made a substantial contribution, and the standard by which the District Court affirmed the finding on cross-appeal, was the standard set forth in the case law that was in existence at the time. The Bankruptcy Court cited exactly the same cases that DPP presents to this Court. As such the Bankruptcy Court's decision that a substantial contribution was made cannot be challenged now by arguing that the Bankruptcy Court applied an erroneous standard.

This Court has stated in *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) that it has the power to review new issues in the interest of judicial administration. The issue of whether or not HFG made a substantial contribution under the existing standards does not affect judicial administration. It only affects DPP and HFG. This Court has stated in *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980) that, although this Court has the power to consider issues not presented in the petition and not argued or presented on appeal, it would only do so in appropriate circumstances. These are not appropriate circumstances. Even if DPP's legal analysis were correct, the finding of a substantial contribution by HFG is merely an erroneous finding of fact. That finding does not present an important federal question.

DPP has never stated that the Bankruptcy Court applied an improper standard. DPP merely disagreed with the conclusion, although the disagreement was not sufficient for DPP to raise the issue before the Fifth Circuit. DPP has not raised the issue of whether the finding of the Bankruptcy Court was made under an improper standard at any stage. This Court held in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) that:

> Our Rule 14.1(a) makes clear that "[o]nly the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court," and our Rule 24.1(a) states that a brief on the merits should not "raise additional questions or change the substance of the questions already presented" in the petition. See *Yee v. Escondido*, 503 U.S. 519, 535 (1992). In addition, we have said that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Youakim v. Miller*, 425 U.S. 231, 234(1976) (per curiam).

This Court's intervention is not necessary. The unstated issue of whether HFG made a substantial contribution, as determined by the Bankruptcy Court, does not meet the requirements of an important issue of federal law or of judicial administration so as to justify review.

IV.

THE FIFTH CIRCUIT'S DECISION ON INTENT AND MOTIVATION IS NOT IN CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT ON AN IMPORTANT FEDERAL QUESTION.

Under 28 U.S.C. § 1254 and Sup. Ct. R. 10, the Court will grant review to resolve a conflict among the Circuit Courts on an important federal question. The alleged conflict is whether the claimant's intent and motivation are relevant to whether the creditor made a substantial contribution in the case. The Fifth Circuit opined that the creditor's subjective motivations are not relevant to the determination. DPP does not agree, and it argues that there is a conflict among the Circuits. There is not. Most of the cases cited by DPP are Bankruptcy Court cases, not Circuit Court cases. This Court rarely grants review to resolve conflicts between Circuit Courts and Bankruptcy Courts.[8] The only Circuit Court case cited by DPP is *In re Lister*, 846 F.2d 55 (10th Cir. 1988). *Lister* does not say that the creditor's subjective motivation is important. *Lister* states:

> Generally, creditors are presumed to act primarily in their own interest and not for the benefit of the estate as a whole.

Id. at 57. The Tenth Circuit did not review why Mr. Haskins, the claimant and the applicant, did what he did. Rather the Tenth

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8. *See* footnote 3, *infra.*

Circuit examined what he did. His action was the key in affirming the denial of a substantial contribution claim. Most of what Mr. Haskins did occurred before the Chapter 11 case was filed. Mr. Haskins' actions after the filing did not meet the criteria for a substantial contribution. His actions did not overcome the presumption of self-interest.

The Fifth Circuit, cited *Lebrom v. Mechem Financial, Inc.*, 27 F.3d 937 (3rd Cir. 1994) in its discussion about substantial contribution. The Third Circuit in *Lebrom* follows the position articulated by the Tenth Circuit as to motivation and intent.

> Creditors are presumed to be acting in their own interests until they satisfy the court that their efforts have transcended self-protection.

Id. at 944. The other circuits say the same thing that the Fifth Circuit has stated here. Self-interest by creditors is presumed to exist. It is therefore largely immaterial to the determination of whether a substantial contribution has been made. The claimant must overcome the presumption that it acted only to benefit itself. The presumption is not overcome by showing altruistic motivation. The administrative claimant overcomes the presumption by showing that its efforts made a substantial contribution in the case, either by increasing substantially the payments to creditors or by contributing substantially to the reorganization of the debtor. No Circuit Court has held that a finding of substantial contribution depends upon the claimant's selfless motivation. There is no conflict in the Circuit Courts.

V.

THE FIFTH CIRCUIT'S DECISION ON INTENT AND MOTIVATION IS NOT AN IMPORTANT FEDERAL QUESTION THAT THIS COURT NEED REVIEW.

DPP asserts that the issue of intent is an important question of federal law that should be settled by this Court. Such is not the case. The presumption of self-interest with regard to determining whether to allow a substantial contribution claim pre-dates the Bankruptcy Code. The case of *In re Solar Mfg. Corp.*, 200 F.2d 780 (3rd Cir. 1953); *In re Mt. Forest Fur Farmers of America, Inc.*, 157 F.2d 640 (6th Cir. 1946) and *Skere v. Baldwin Locomotive Works*, 98 F.2d 889, 891 (3rd Cir. 1938), as cited in *Lebrom* makes the same point. Various cases at the Bankruptcy Court level are proceeding under the guidance of three prior Circuit Court cases, *Lister, Lebrom* and *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986). All three cases direct the lower courts to presume self-interest when making the determination of a substantial contribution. The Fifth Circuit's decision in *DPP Partners* does not alter that landscape. It merely states it differently. Intent is not an issue, says the Fifth Circuit. The issue is benefit to the estate or to the reorganization. The other circuits agree. It is presumed that the creditor acts in its own self-interest. There is no federal question as to intent, that needs to be settled by this Court.

CONCLUSION

There are no Circuit Courts that conflict with the opinion of the Fifth Circuit below. There are no important questions of federal law that this Court needs to resolve. The Fifth Circuit's ruling that: (a) 11 U.S.C. § 503 does not contain an unwritten requirement that a creditor give advance notice of a substantial contribution administrative claim prior to plan confirmation; and (b) that intent is not an issue in a substantial contribution application, is a straightforward reading of § 503 and a continuation of the stated position in the Circuits that, since creditor self-interest is presumed, it is of little relevance to the determination of whether a substantial contribution has been made in a case.

There are no bankruptcy policy issues in this case. HFG was entitled by statute to file its substantial contribution claim. DPP is deemed to know of that right. DPP had the tools to learn whether HFG would file an administrative claim and for what amount. DPP failed to utilize the available tools. DPP's errors do not create an important question of bankruptcy policy or judicial administration. For these reasons the Petition should be denied.

Respectfully submitted,

E. PAUL KEIFFER
Counsel of Record
ROBERT A. SIMON
FRANK J. WRIGHT
BURKE, WRIGHT & KEIFFER, P.C.
Attorneys for Respondent
2900 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2102
(214) 742-2900

APPENDIX A — RELEVANT DOCKET ENTRIES

M-TOL APPEAL
CLOSED

U.S. District Court
Northern District of Texas (Dallas)

CIVIL DOCKET FOR CASE #: 95-CV-115

Hall Financial Group v. DP Partners Ltd. et al Filed: 01/19/95
Assigned to: Judge Jorge A Solis
Demand: $0,000 Nature of Suit: 422
Lead Docket: None Jurisdiction: Federal Question
Dkt # in bk court: is 394-31738-RCM-11

Cause: 28:1334 Bankruptcy Appeal

ROBERT C MCGUIRE Bankruptcy Judge	Robert C McGuire [COR NTC pse] [PRO SE] US Bankruptcy Court Chambers of Judge Robert C McGuire 1100 Commerce St Room 14B5 Dallas, TX 75242 USA 214/767-0816
HALL FINANCIAL GROUP, INC appellant	Edwin Paul Keiffer, Attorney at Law [COR LD NTC ret] Burke & Wright Renaissance Tower

Appendix A

1201 Elm Street
Suite 2900
Dallas, TX 75270-2102
USA
214/742-2900

v.

DP PARTNERS LTD
PARTNERSHIP
appellee

Anthony Alan Petrocchi,
Attorney at Law
[COR ret]
Christopher M Weil,
Attorney at Law
[COR LD NTC ret]
Weil & Petrocchi
Plaza of the Americas
1900 North Tower
LB 364
Dallas, TX 75201
USA
214/969-7272

Arthur Ungerman
[term 02/10/95]
[COR LD NTC ret]
Ungerman & Vickers
San Jacinto Tower
2121 San Jacinto St
Suite 1600 LB 74
Dallas, TX 75201
USA
214/740-0229

Appendix A

SUSSEX PROPERTIES INC appellee	Anthony Alan Petrocchi Attorney at Law (See above) [COR ret] Christopher M Weil, Attorney at Law (See above) [COR LD NTC ret]

Bankruptcy Judge: ROBERT C MCGUIRE
Bankruptcy Judge

HALL FINANCIAL GROUP, INC
appellant

v.

DP PARTNERS LTD PARTNERSHIP; SUSSEX PROPERTIES INC
appellee

Date		Proceedings
1/19/95	—	PRELIMINARY ASSIGNMENT TO Magistrate Judge John B Tolle (yrw) [Entry date 01/24/95]
1/19/95	1	Letter from U.S. Bankruptcy Court transmitting bankruptcy record on appeal. (15+) (yrw) [Entry date 01/24/95]
1/24/95	2	Letter transmitting bankruptcy record on appeal to presiding judge. CC to counsel, bankruptcy clerk and bankruptcy judge. Appellant's brief due 2/8/95 for Hall Financial Group (1) (yrw)

Appendix A

2/9/95	3	MOTION by appellee DP Partners Ltd for law firm of Ungerman & Vickers atty Ungerman & Schurr to withdraw as attorney (4) (mer) [Entry date 02/10/95]
2/10/95	4	ORDER granting [3-1] motion for law firm of Ungerman & Vickers atty Ungerman & Schurr to withdraw as attorney (Terminated attorney Ungerman & Schurr and the Law firm of Ungerman & Vickers for DP Partners Ltd (signed by JAS) Copies to counsel: 2-10 Page(s) 2 (mer) [Entry date 02/13/95]
2/13/95	5	Appellant's BRIEF by appellant Hall Financial Group. Appellee's brief due 2/28/94 for Sussex Properties, for DP Partners Ltd (15+) (mer) [Entry date 02/14/95] [Edit date 02/17/95]
2/15/95	6	CERTIFICATE OF SERVICE Re: [4-1] order by appellee DP Partners Ltd re mtn to w/draw as cnsl served upon cnsl for Hall Financial Group (4) (mer)
2/28/95	7	UNOPPOSED MOTION by appellee DP Partners Ltd, appellee Sussex Properties to extend time to file brief of appellee (5) (mer)
3/1/95	8	ORDER granting [7-1] motion to extend time to file brief of appellee, reset appellee's brief due for 3/7/95 for Sussex Properties, for DP Partners Ltd (signed by JAS) Copies to counsel: 3-1 Page(s) 1 (mer)

Appendix A

3/7/95	9	SECOND MOTION with memorandum in support by appellee DP Partners Ltd, appellee Sussex Properties to extend time to file brief of appellee (5) (mer) [Entry date 03/08/95]
3/14/95	10	Appellee's BRIEF by appellee DP Partners Ltd, appellee Sussex Properties. (15+) (lmn) [Entry date 03/16/95]
3/30/95	11	UNOPPOSED MOTION by appellant Hall Financial Group to extend time to file reply brief (5) (mer) [Entry date 03/31/95]
3/31/95	12	ORDER granting [11-1] motion to extend time to file reply brief, reset Appellant's reply brief due for 5:00 4/5/95 for Hall Financial Group (signed by JAS) Copies to counsel: 3-31 Page(s) 1 (mer) [Entry date 04/01/95]
4/4/95	13	ORDER granting [9-1] motion to extend time to file brief of appellee, RESET appellee's brief due for 3/14/95 for Sussex Properties, for DP Partners Ltd (signed by JAS) Copies to counsel: 4/4/95 Page(s) 1 (jac) [Entry date 04/06/95]
4/5/95	14	Appellant's REPLY BRIEF by appellant Hall Financial Group. (15+) (mer) [Entry date 04/07/95]
4/10/95	15	NOTICE of Erratum and Correction by appellant Hall Financial Group (5) (mer)
4/19/95	16	MOTION by appellant Hall Financial Group to extend time to file reply brief of appellees/cross-appellants (5) (mer) [Entry date 04/20/95]

Appendix A

4/20/95	17	ORDER granting [16-1] motion to extend time to file reply brief of appellees/cross-appellants, RESET appellee's brief due for 4/20/95 for Sussex Properties, for DP Partners Ltd (signed by JAS) Copies to counsel: 4/20/95 Page(s) 1 (jac) [Entry date 04/24/95]
4/20/95	18	Appellee's BRIEF by appellee DP Partners Ltd. appellee Sussex Properties. Appellant's reply brief due 5/1/95 for Hall Financial Group (15) (jac) [Entry date 05/02/95]
8/11/95	19	ORDER for Oral Argument on Bankruptcy Appeal on 11/8/95 at 3:00 p.m. (signed by JAS) Copies to counsel: 8-14-95 Page(s) 1 (lch) [Entry date 08/15/95]
11/3/95	20	MEMORANDUM OPINION AND ORDER . . . the Court AFFIRMS the Bankruptcy Court's Order of 11/14/94 regarding the issues presented within this appeal . . . SEE ORDER FOR SPECIFICS (signed by JAS) Copies to counsel: 11-6-95 Page(s): 12 (lch) [Entry date 11/06/95]
11/3/95	—	Case closed (lch) [Entry date 11/06/95]
11/6/95	—	8 vols of bankruptcy papers placed on designated shelf in fileroom. Return to Bankruptcy Court on 12/11/95 if no appeal or motion filed (gjs) [Entry date 11/14/95]
11/20/95	21	NOTICE OF APPEAL to USCA by appellant Hall Financial Group from order entered 11/2/95. Fee payment amount: $105.00 Receipt # 76394 (sak) [Entry date 11/22/95]

Appendix A

11/22/95 — Notice of appeal and certified copy of docket to USCA: [21-1] appeal (sak)

11/29/95 22 DESIGNATION of items to be included by appellant Hall Financial Group in the record and statement of issues on appeal to the United States Fifth Circuit Court of Appeals (6) (jyg) [Entry date 11/30/95]

12/8/95 — USCA Case Number, 95-11110 Re: [21-1] appeal (bss)

12/11/95 23 APPELLEES DESIGNATION by DP Partners Ltd of record on appeal. (4) (bss) [Entry date 12/15/95]

12/11/95 23 STATEMENT OF ISSUES ON APPEAL TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS by DP Partners Ltd (4) (bss) [Entry date 12/15/95]

12/21/95 — Transmitted record on appeal to U.S. Court of Appeals: [21-1] appeal . . . 1 vol of district court papers; 5 vols of appellants designation (bk papers); 1 vol of cross appellants designation (bk papers); 3 vols of appellee/cross appellant's designation (bk papers) TOTAL BK VOLS - 9); and 1 env. of bk exhibits and 1 vol of bk exhibits. (TOTAL VOLS OF CASE PAPERS - 10 and 2 containers of exhibits.) (bss)

Docket as of February 13, 1996 10:55 am

APPENDIX B — EXCERPTED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION ENTERED AUGUST 31, 1994

Arthur I. Ungerman
State Bar No. 20391000
Patrick J. Schurr
State Bar No. 17853530
UNGERMAN & VICTERS
1401 San Jacinto Tower — LB 74
2121 San Jacinto Street
Dallas, Texas 75201
Telephone: (214) 740-0229

ATTORNEYS FOR THE DEBTOR

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CASE NO. 394-31738-RCM-11

IN RE:

DP PARTNERS LIMITED PARTNERSHIP,

Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING SECOND AMENDED PLAN OF REORGANIZATION, AS AMENDED, OF DP PARTNERS LIMITED PARTNERSHIP

DP Partners Limited Partnership (the "Debtor") presented

its Second Amended Plan of Reorganization (the "DP Plan" or "Plan"), filed July 1, 1994 and the First Amendment to the Second Amended Plan of Reorganization of DP Partners Limited Partnership dated August 11, 1994 (the "Amendment"), and attached hereto as Exhibit "A", and Hall Financial Group, Inc. ("HFG") presented its Second Amended Plan of Reorganization for DP Partners (the "HFG Plan") dated July 13, 1994 to this Court on August 12, 1994. At such time, the Court heard testimony and stipulations of counsel, reviewed the DP Plan and the HFG Plan and found:

A. *Findings and Conclusions.* Findings of fact shall be construed as conclusions of law, and conclusions of law shall be construed as findings of fact where appropriate.

* * *

unsecured, and for secured indebtedness that is satisfied pursuant to the Plan.

(f) *Judgments.* Except as provided in the Plan and subject only to the occurrence of the Effective Date, any judgment at any time obtained, to the extent that such judgment is a determination of personal liability of the Debtor with respect to any debt or claim discharged hereunder, is hereby rendered null and void.

(g) *Retention of Jurisdiction.* The Court shall retain jurisdiction of this case in accordance with the Plan, including, without limitation, section XII of the Plan, Section 1142 of the Code and Bankruptcy Rule 3020(d).

Appendix B

(h) *Administrative Claim.* Notwithstanding anything to the contrary set forth in the Plan, all applications for final compensation of professional persons, employed by the Debtor and approved by this Court for services rendered prior to Confirmation and all other requests for payment of administrative costs and expenses incurred prior to Confirmation pursuant to Section 501(a)(1) or 507(b) of the Code (except claims for taxes, trade debt and customer deposits and credits incurred in the ordinary course of business), to the extent not previously filed with the Court or allowed by order thereof, shall be filed no later than sixty (60) days after the Effective Date. Failure to file such Claims, including Administrative Claims, within the time periods set forth herein shall result in the disallowance of such Claims. Payment of any such Administrative Claims will be and hereby are subject to any limitation imposed in the Plan.

(i) *Objections to Claims.* The Debtor shall commence, file or assert any objections to Claims no later than ninety (90) days after the Effective Date. Failure to file such objections within the time periods set forth herein shall result in the allowance of such Claims.

SIGNED this the day of August, 1994.

ROBERT C. MCGUIRE, JUDGE
UNITED STATES BANKRUPTCY COURT

Agreed to as to form and
substance:

Appendix B

UNGERMAN & VICKERS
1601 San Jacinto Tower - LB 74
2121 San Jacinto Street
Dallas, Texas 75201
Telephone: (214) 740-0229

By: s/ Patrick J. Schurr
Arthur I. Ungerman
State Bar No. 20391000
Patrick J. Schurr
State Bar No. 17853530

ATTORNEYS FOR THE DEBTOR

FULBRIGHT & JAWORSKI, L.L.P.
2200 Ross Avenue
Suite 2800
Dallas, Texas 75201
Telephone: (214) 855-8000

By: s/ Michael W. Anglin
Michael W. Anglin
State Bar No. 01260800

ATTORNEYS FOR STATE STREET
BANK AND TRUST

APPENDIX C — EXHIBIT FROM THE PLAN CONFIRMATION HEARING

August 11, 1994

VIA TELECOPY

Mr. Joseph Melton
Mr. Tony Swartz
Sussex Investments, Inc.
2121 San Jacinto Street
Suite 1420
Dallas, Texas 75201

Re: *Internal structure of DP Partners*

Dear Messrs Melton and Swartz:

This is to confirm our agreement concerning the relationship of the partners in DP Partners Limited Partnership ("Partnership"). The following is a description of that agreement:

1. *Partnership Interests:* The partners will have the following interests in and to the Partnership:

Partner	Type	Interest
Sussex Properties, Inc. ("Sussex")	General	1.00%
BH Associates Limited Partnership	Limited	49.50%
Chateau Estates ("Chateau")	Limited	24.75%
Irving Smokler	Limited	24.75%
		100.00%

Appendix C

It is understood that Irving Smokler's interest will be held either by him or an entity owned or controlled by him. It is also understood that Chateau did not intend to sell, transfer or otherwise relinquish its beneficial interest in and to the Partnership and that Sussex has been holding Chateau's interest in trust on behalf, and for the benefit, of Chateau as a limited partner. The remaining partners in the Partnership have heretofore acknowledged that Chateau has retained its beneficial interest.

2. *Nev Equity:* The limited partners will contribute the equity required under the plan of reorganization of the debtor ("Debtor's Plan") in the ratio of their partnership interests set forth above (up to $2,150,000.00 in the aggregate) if (i) the Debtor's Plan is confirmed and (ii) Sussex assigns and conveys the difference between the 25% interest it previously held and the 1% interest it is retaining (i.e., 24%) free and clear of any claims, liens, security interests or the like so that the limited partners have the interests set forth above. In addition, subject to the foregoing, the limited partners, in the ratio of their respective now capital contributions, will provide funds sufficient to pay the legal and other expenses incurred to date in connection with the Debtor's Plan, not to exceed $200,000.00 (it being understood that sufficient detailed documentation must be provided), and such additional amounts from time to time as may be reasonably required for the payment of current and past due property taxes and the like in the judgment of the limited partners. All contributions by the limited partners pursuant to this paragraph from time to time are herein referred to as the "New Equity". The New Equity contributed shall earn a preferred return of 8 1/2% per annum from the date of contribution until the New Equity has been returned ("Priority Return"). The Priority Return shall be payable quarterly from net cash flow, if

any, on a cumulative basis. All or any portion of the Priority Return which has not been paid shall accrue and shall be paid from the first available net cash flow, if any. Distribution of net cash flow shall not be deemed to be a return of capital.

3. *Asset Management Fee:* For the period commencing on the date the Debtor's Plan is confirmed and ending on the fifth anniversary thereof ("Anniversary Date"). Sussex will be entitled to receive an asset management fee ("AMF") equal to 1% per annum of the gross rentals of the projects owned from time to time by the Partnership, payable quarterly (subject to annual reconciliation), to the extent of net cash flow, if any. In the event the funds from operations are insufficient to pay all or any portion of the AMF, such unpaid amount shall accrue, without interest, and shall be paid only to the extent net cash flow, or any net sale or net refinancing proceeds are sufficient to pay such amount. For purposes of this paragraph 3, "net cash flow" shall be the gross revenues reduced by all operating expenses of the partnership, including all debt service payments, working and capital reserves, and payment of the cumulative Priority Return.

4. *Fee Upon Sale*: Upon any sale of one or more of the projects of the Partnership after the Anniversary Date, Sussex shall be entitled to a fee equal to 1.125% of the gross selling price ("Sale Fee"). No fees shall be payable in the event of a foreclosure or a deed in lieu (provided the Partnership does not receive any cash consideration). There shall be no sale or other conveyance of the projects of the Partnership without the prior written consent of a majority in interest of the limited partners. Upon a sale, any accrued AMF will be payable to the extent the net sale proceeds are available to pay such fee after paying all outstanding obligations of the Partnership, paying the costs of

the sale or refinance transaction, returning the New Equity to the limited partners, and paying any arrearage in the cumulative Priority Return to the limited partners. In the event Sussex produces after the Anniversary Date a bona fide cash offer, in writing, to purchase the projects of the Partnership for $55,000,000.00 or more and the limited partners do not consent to the proposed sale, Sussex shall, in that event, be entitled to payment of the Sale Fee as if the sale had been consummated pursuant to the bona fide written offer. For purposes of this paragraph 4, "net cash flow" shall have the definition set forth in paragraph 3 above. The limited partners shall have the right to cause the projects to be sold at any time after the Anniversary Date.

5. *Investor's Representative:* It is agreed that Irving Smokler shall act as the investor's representative for the limited partners and shall oversee the management of the projects and the Partnership's affairs along with Sussex. In the event of a dispute, such dispute shall be submitted to the limited partners for a vote of the majority in interest of the partners shall control.

6. *Property Management*: The projects will continue to be managed by GFS of Texas, which manager shall be terminated without the consent of a majority in interest of the limited partners. Should the manager resign, its replacement shall be designated by a majority in interest of the limited partners.

7. *Partnership Agreement Amendment*: The parties agree to forthwith amend the partnership agreement of the Partnership upon confirmation of the Debtor's Plan (i) to reflect the foregoing, (ii) to prohibit Sussex from assigning or otherwise transferring its interest without the consent of the limited partners, and (iii) to add a provision which provides that in the

event Sussex assigns or transfers its general partner interest, or if such interest is assigned or otherwise transferred pursuant to the operation of law or otherwise (including a foreclosure), a majority in interest of the limited partners shall have the immediate right to remove Sussex as a general partner prior to any such assignment or other transfer and to replace Sussex with a general partner acceptable to the limited partners.

Please confirm that the foregoing accurately describes our agreement by making a copy of this letter, signing it, and returning it to the undersigned by facsimile and overnight delivery. Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

BH ASSOCIATES LIMITED PARTNERSHIP
CHATEAU ESTATES and
IRVING SMOKLER

By: s/ Irving Smokler
Irving Smokler
Authorized Representative

By:
Mandell L. Berman
Authorized Representative

AGREED AND ACCEPTED:

SUSSEX PROPERTIES, INC.

By: _____

and

By: _____

Appendix C

LAW OFFICES
HONIGMAN MILLER SCHWARTZ AND COHN
A Partnership Including Professional Corporations
2280 First National Building
Detroit, Michigan 48228-3583
Telecopier (313) 962-0176

M. ALAN GOCHA
Direct Dial Number
(313) 256-7007

Lansing, Michigan
West Palm Beach, Florida
Tampa, Florida
Orlando, Florida
Houston, Texas
Los Angeles, California

August 11, 1994

VIA TELECOPY

Mr. Chris Weil
Weil & Petrocci
1900 Plaza of the Americas
North Tower
Dallas, Texas 75201

Re: *DP Partners*

Dear Chris:

We are the attorneys for BH Associates Limited Partnership, Chateau Estates and Irving Smokler in this transaction. This will serve to confirm that during a telephone conference with BH Associates Limited Partnership, Chateau Estates and Irving Smokler today, Chateau Estates specifically authorized Messrs.

Appendix C

Berman and Smokler to sign the letter dated August 11, 1994 concerning the internal structure of DP Partners for and on behalf of Chateau Estates.

Should you have any questions, please call me.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN
By: s/ M. Alan Gocha
M. Alan Gocha

HAG/vz

cc: John Boll (via telecopy)
Maurice S. Binkow, Esq.